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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Circuit's analysis of the state treasury factor in this case and its finding that the Ports Authority is entitled to Eleventh Amendment immunity conflict with the standards for evaluating Eleventh Amendment questions set forth by the Supreme Court in Hess v. Port Authority Trans-Hudson Corporation?

2. Is the South Carolina State Treasury obligated to bear a potential judgment in the Ristows' favor?

3. Does the Fourth Circuit's view of the control factor regarding the Ports Authority conflict with the position of the dissent in Hess with respect to control?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

The petitioners, Fred W. Ristow and Susan M. Ristow, pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court

of Appeals for the Fourth Circuit entered in this action on July 20, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 58 F. 3d 1051 (4th Cir. 1995). It is reprinted in the appendix ("App.") at A1-21. The District Court's unpublished decision and order granting dismissal is reprinted at App. B1-6. The Supreme Court's previous order granting certiorari with respect to the petitioners' prior petition in this case (Supreme Court Docket No. 94-428), vacating the Fourth Circuit's earlier decision in this case, and remanding the case to the Fourth Circuit for reconsideration in light of the decision in Hess v. Port Authority Trans-Hudson Corp., 513 U.S. ____, 115 S. Ct. 394, 130 L.

Ed. 2d 245 (1994), is reported at ___ U.S. ___, ___ S. Ct. ___, 130 L. Ed. 2d 485 (1994) and is reprinted at App. C1-2. The earlier opinion of the Court of Appeals vacated by the Supreme Court is reported at 27 F. 3d 84 (4th Cir. 1994) and is reprinted at App. D1-30.

JURISDICTION

The Court of Appeals entered judgment on July 20, 1995. This petition for writ of certiorari was filed within 90 days of that date, and this Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Sec. 1254 (1).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Eleventh Amendment of United States Constitution, which is set forth at App. E1. The state statutes

involved are numerous provisions contained in Section 54, Chapter 3, Articles 1 through 11 of the South Carolina Code Ann. These are set forth at App. E2-54.

STATEMENT OF THE CASE

A. THE PARTIES

The petitioners, Fred W. Ristow and Susan M. Ristow, hereinafter referred to as "Ristows" or "petitioners", are husband and wife and citizens of the State of Wisconsin. At all times material to this action, Fred W. Ristow was employed as a long haul truck driver and longshoreman. (App. F3, 7)

The respondent, South Carolina State Ports Authority, hereinafter referred to as the "Ports Authority", "Authority," or "respondent", is statutorily defined as an instrumentality of

the State of South Carolina and is engaged in the business of managing and developing the ports and harbors in the State. See S.C. Code Ann., Sec. 54-3-130 at App. E6-10. The Ports Authority has the highly autonomous powers of a body corporate, including the power to sue and be sued, own property in its own name, borrow money, pay its expenses, etc. See S.C. Code Ann., Sec. 54-3-140 and Sec. 54-3-1020 at App. E10-18, 52-53.

The respondent designated in the caption as "The SS Unknown" is an unknown ship which was never identified and served. (App. A4) It was ultimately dismissed as a defendant, and the Ristows did not appeal that dismissal.

B. THE INCIDENT IN QUESTION

On December 20, 1988, Fred W. Ris-

tow in the course of his employment, had transported a load of steel pipe on a flat bed truck to the Ports Authority's terminal in Charleston, South Carolina. (App. F8-9) Such pipe was to be picked up later at the terminal by an unknown ship. (App. F9) While Mr. Ristow was standing on top of the load of pipe on the trailer and assisting in the unloading process, a fork lift driver employed by the Ports Authority, picked up the entire load of pipe with the fork lift, lost control of the load, and dropped one bundle of pipe. (App. F10-11) Mr. Ristow had to jump from the truck to avoid fatal injury. (App. F11) As he jumped, Mr. Ristow was struck in the left lower extremity by falling pipe and sustained severe injuries. (App. F11-14)

The Ports Authority notified its insurance carrier, Lloyds of London, of the incident, and an insurance adjustment firm, Crawford and Company, of Charleston, South Carolina was retained to represent the Ports Authority and the insurance carrier. (App. F18-19; H2) A Crawford employee by the name of Lee Pitillo was assigned to handle this matter, and he led the Ristows to believe they could settle their claim for damages arising from the accident directly with Lloyds of London by dealing with him and without counsel. (App. F19; H2-3)

Subsequently, in July of 1990, the Ristows had a telephone conversation with Mr. Pitillo during which he offered to settle their claims for $75,000.00. (App. F19-20; H3) The Ristows accepted

this offer and waited for the settlement check and paperwork to arrive. (App. F20-21; H3) Despite repeated reassurances by Mr. Pitillo, no settlement check ever arrived. (App. F21; H3) In December of 1990, the Ristows retained counsel to assist them with this matter.

C. PREVIOUS PROCEEDINGS AND DISPOSITION

1. DISTRICT COURT PROCEEDINGS

In December of 1991, the Ristows commenced this action in the U.S. District Court for the District of South Carolina, Charleston Division, against the Ports Authority and the unknown ship alleging ordinary negligence by the Ports Authority employee and vicarious liability for such negligence by the

Ports Authority and the unknown ship.[1] (App. F11-16) Mrs. Ristow's claim was for loss of consortium. (App. F16-18) The Ristows also asserted a breach of contract claim against the Ports Authority based upon the aforementioned settlement agreement. (App. F18-22)

Federal jurisdiction was founded on diversity under 28 U.S.C. Sec. 1332 (a) and admiralty under 28 U.S.C. Sec. 1333. (App. F1-2) The parties consented to have the proceedings conducted before a U.S. Magistrate Judge pursuant to 28 U.S.C. Sec. 636 (c), and the case was assigned to the Hon. Robert S. Carr. (App. B1)

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1 The unknown ship was designated as "The SS Unknown," but the vessel was never identified and served.

The Ports Authority moved for dismissal for lack of subject matter jurisdiction alleging, among other things, that the Ports Authority was an agency of the State of South Carolina and the suit was barred by the Eleventh Amendment. (App. G1-3) The Ristows argued the Ports Authority was not entitled to sovereign immunity based upon the application of the factors set forth by the Fourth Circuit in Ram Ditta v. Maryland National Capital Park and Planning Commission, 822 F. 2d 456, 457-458 (4th Cir. 1987).[2] The Ristows also

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[2] The Ram Ditta factors are 1) whether the state treasury will be responsible for paying any judgment that might be awarded; 2) whether the entity exercises a significant degree of autonomy from the state; 3) whether it is involved in local versus state concerns; and 4) how the entity is treated as a matter of state law.

urged the Court to adopt the reasoning of the District Court for the Southern District of New York expressed in Doris Trading Corporation v. The SS Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y. 1976) wherein the Court ruled the Ports Authority was not entitled to sovereign immunity.

In an order entered on September 2, 1992, the District Court, Magistrate Carr, presiding, granted the motion to dismiss holding that the Ports Authority was entitled to Eleventh Amendment immunity. (App. B5) The Court's decision founded upon the cases of South Carolina Ports Authority v. Seaboard Air Line R.R. Co., 124 F. Supp. 533 (D.S.C. 1954) and Coakley v. South Carolina State Ports Authority, D.S.C. Case No. 2:87-

1442-2 (UP 1988)[3] as well as South Carolina statutory law. (App. B4 & 5) The claim against the unknown ship was dismissed due to a lack of service. (App. B5 & 6) A motion to alter judgment was subsequently denied (App. B7-9), and the Ristows then appealed.

2. 1994 COURT OF APPEALS PROCEEDINGS

On June 13, 1994, the United States Court of Appeals for the Fourth Circuit in an opinion by the Honorable James M. Sprouse, Senior Circuit Judge, affirmed the District Court's dismissal of the action. (App. D1) Employing the factors set forth in Ram Ditta, the Fourth Circuit concluded that the Ports Author-

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[3] The Coakley decision is reproduced at App. I1-30.

ity was entitled to Eleventh Amendment immunity. (App. D6-27)

In analyzing the state treasury factor, which it recognized as being the most important criterion, the Court determined the Ports Authority owes its existence and current position to funding by the State. (App. D7-9) The Court believed the State's withdrawal of excess Ports Authority funds and commingling of state funds with those of the Authority indicate that the Ports Authority's funds belong to the State and recovery out of those funds would constitute one from the State treasury. (App. D10) The Court rejected the Ristows' argument that South Carolina statutory law insulated the state treasury from any Ports Authority indebtedness, including any judgment in favor of the

Ristows. (App. D12-13) The Fourth Circuit was not persuaded by the Ristows' assertions that the existence of insurance coverage, the absence of any obligation on the part of the State to fund the Ports Authority or pay judgments against it, and the existence of the Ports Authority's own bank accounts and ability to borrow funds all weighed heavily against immunity. (App. D13-19)

Although admitting the Ristows' arguments as to the existence of the Ports Authority's own funds and the absence of a provision committing the state treasury to fund the Authority or pay a judgment found support in the Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F. 2d 628 (2nd Cir. 1989), aff'd on other grounds, 495 U.S. 299, 110 S. Ct. 1868,

109 L. Ed. 2d 264 (1990), the Court favored what it described as the "broader" and more practical approach of the Third Circuit for analyzing the treasury factor set forth in Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, 819 F. 2d 413 (3rd Cir. 1987), cert. den. 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987). (App. D14-16) Thus, the Court concluded that the state treasury factor supported Eleventh Amendment immunity. (App. D17) Ram Ditta's control and state versus local concerns factors were also believed to favor immunity. (App. D20-24)

3. SUPREME COURT PROCEEDINGS

On September 7, 1994, the Ristows filed a petition for certiorari with the Supreme Court to review the June 13,

1994 decision of the Fourth Circuit. Their petition was assigned Docket No. 94-428.

The conflicting approaches in analyzing the state treasury factor employed by the Second Circuit in Feeney and the Third Circuit in Police Benevolent Association formed the basis of their petition. The Ristows identified this conflict as being one between an actual financial analysis with respect to the state treasury factor versus a broad symbiotic relationship approach. In an order entered on November 28, 1994, the Supreme Court granted certiorari, vacated the June 13, 1994 decision of the Fourth Circuit, and remanded this case for further consideration in light of Hess. (App. C1-2)

4. 1995 COURT OF APPEALS PROCEEDINGS

On reconsideration, the Ristows once again emphasized the protection of the South Carolina state treasury as established by the following facts: 1) the existence of insurance coverage through Lloyds of London; 2) the existence of the Ports Authority's own funds and the ability to raise funds; 3) the absence of a continued funding obligation on the part of the State; and 4) the insulation provision outlined in S.C. Code Ann., Sec. 54-3-140(9). In deciding Hess, the Ristows believe that the Court had established an actual financial approach as being the proper method of analyzing the state treasury factor. They contended the state treasury test in Hess clearly favored the denial of immunity for the Ports Authority.

In its decision again written by Senior Circuit Judge Sprouse, the Fourth Circuit interpreted Hess as providing both a legal and practical analysis of whether the state treasury is obligated to bear the resulting indebtedness of the enterprise. (App. A12) The Court admitted there is no legal obligation on the part of the State to cover the Authority's debts and a judgment against the Authority could not be legally enforced against the State. (App. A11, 15-16, 18) When analyzed from the practical standpoint, however, the Court was convinced that a judgment against the Authority involved the "core concern" of the Eleventh Amendment - the ebb and flow of funds into and out of the state treasury. (App. A18-19) Thus, the Au-

thority is entitled to Eleventh Amendment immunity. (App. A19)

The Fourth Circuit's practical analysis was founded on the State's so-called immersion in the financial affairs of the Ports Authority. (App. A13) Since 1959, the State had issued $132 million in bonds to finance Authority improvements, and tax revenues were used to repay the principal and interest on such indebtedness. (App. A13-14) The State had also withdrawn over $1.5 million from the Ports Authority. (App. A14) Unlike the entity in Hess, the Court was convinced that the Ports Authority was not self-sufficient. (App. A15-16) According to the Court, the practical effect of the State's treatment of the Authority's fiscal affairs implicated the state treasury. (App.

A16-17) The Court did not discuss the Authority's insurance coverage in its opinion.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. THE FOURTH CIRCUIT'S ANALYSIS OF THE STATE TREASURY FACTOR IN THIS CASE AND ITS FINDING THAT THE PORTS AUTHORITY IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY CONFLICTS WITH THE STANDARDS FOR EVALUATING ELEVENTH AMENDMENT QUESTIONS SET FORTH BY THE SUPREME COURT IN HESS V. PORT AUTHORITY TRANS-HUDSON CORP.

A. INTRODUCTION

When this case last came before the Supreme Court, the Ristows' petition was founded upon the aforementioned conflict between the Second and Third Circuits in their respective methods of analyzing the important state treasury factor. Thus, their petition relied primarily upon the considerations set forth in Supreme Court Rule 10.1(a) to support the granting of certiorari. See prior Peti-

tion in No. 94-428. The Ristows believe the Supreme Court resolved this conflict in Hess by first re-emphasizing the importance of the state treasury factor in addressing Eleventh Amendment questions and then adopting an actual financial analytical approach as the proper method for evaluating this important factor. The broad symbiotic relationship approach utilized by the Fourth Circuit in its previous decision was soundly rejected.

After reviewing the Fourth Circuit's July 20, 1995 decision, it is apparent that the so-called "immersion" of the State in the Port Authority's financial affairs cited by the Court as the basis for granting immunity bears a striking resemblance to the now discredited broad financial/symbiotic relationship method-

ology previously employed. Rather than following the teachings of Hess in its reconsideration of this case, the Fourth Circuit has merely recast the language of its decision in an attempt to comply with Hess on its face but has ignored the substance of Hess. As will be discussed herein, the Fourth Circuit's decision on this important constitutional issue clearly conflicts with Hess. The Ristows' petition therefore presents a matter which satisfies the considerations outlined in Supreme Court Rule 10.1(c) and requires Supreme Court review.

B. A DISCUSSION OF THE HESS DECISION

1. BI-STATE ENTITY DISCUSSION

Although the Fourth Circuit in Gray v. Laws, 51 F. 3d 426, 431 (4th Cir. 1995) claimed the Hess opinion is cer-

tain to generate confusion, the Ristows believe it is perfectly clear. In addressing the conflict between the Second and Third Circuits as to whether the Port Authority Trans-Hudson (i.e. PATH), a bi-state entity, was entitled to Eleventh Amendment immunity, the Court first outlined the state treasury and dignity protection purposes of the Amendment and discussed the significantly different position in the federal system occupied by bi-state entities. Hess, 130 L. Ed. 2d at 255-257.

The Court then reiterated the general rule set forth in Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979) with respect to Compact Clause agencies which presumes such agencies are not entitled to Eleventh

Amendment immunity "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose." Hess, 130 L. Ed. 2d at 257. The discussion about the special place occupied by bi-state entities provided further justification for the existence Lake Country presumption.

An examination of the indicators of immunity was then conducted to see if good reason existed to overcome the presumption. Hess, 130 L. Ed. 2d at 258-259. Unlike the situation in Lake Country, the Supreme Court believed the indicators of immunity or absence thereof pointed in different directions in Hess. Hess, 130 L. Ed. 2d at 258-259. There-

fore, a determination under the general rule pertaining to interstate compact entities could not be made in Hess.

After finding the indicators connected with the presumption to be inconclusive, the Court shifted its inquiry to the Eleventh Amendment's twin reasons for being, i.e. the protection of state dignity and solvency. Hess, 130 L. Ed. 2d at 255 & 259. Having already discussed the state dignity concerns, the Court first discussed control and then examined the state treasury factor. Hess, 130 L. Ed. 2d at 259-263.

2. THE REJECTION OF CONTROL

With respect to control or autonomy, the Ristows believe the following passage shows the Court's ultimate rejection of state control as a relevant factor in an Eleventh Amendment analysis:

> Gauging actual control, particularly when an entity has multiple creator-controllers, can be a "perilous inquiry," "an uncertain and unreliable exercise." See Note, 92 Colum. L. Rev. 1243, 1284 (1992); see also id., at 1302, and n. 264 (describing "degree to which the state controls the entity" as a criterion neither "[i]ntelligible" nor "judicially manageable")
>
> Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury." [Citations omitted] Hess, 130 L. Ed. 2d at 260.

The dissent has interpreted the majority opinion as having rejected control altogether. Hess, 130 L. Ed. 2d at 269. In light of the foregoing discussion, the Fourth Circuit's comment in Gray that the Supreme Court did not dismiss control altogether is indeed curious. Gray, 51 F. 3d at 432. Although

control is not specifically discussed in Ristow, the Fourth Circuit's comments in footnotes 4 and 10 of the opinion would appear to reaffirm the view regarding control expressed in Gray. See App. A8, 9 & 19.

3. THE DOMINANT STATE TREASURY FACTOR

The Court then examined the role state treasury factor. Having recognized state solvency to be one of the Eleventh Amendment's twin reasons for being[4] and treasury protection to be the Amendment's core concern,[5] the Court engaged in an extensive survey of case law holding the treasury factor to be the most important inquiry in an Eleventh

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[4] Hess, 130 L. Ed. 2d at 255 & 259.

[5] Hess, 130 L. Ed. 2d at 262.

Amendment analysis. Hess, 130 L. Ed. 2d at 259-261. Quite significantly, the analysis cited cases involving both single state entities, such as Jacintoport v. Greater Baton Rouge Port Com., 762 F. 2d 435 (5th Cir. 1985), cert. den. 474 U.S. 1057, 106 S. Ct. 797, 88 L. Ed. 774 (1986) and Royal Caribbean Corp. v. Puerto Rico Ports Authority, 973 F. 2d 8 (1st Cir. 1992) for example, and bi-state entities. Hess, 130 L. Ed. 2d at 260-261.

While the treasury criterion had generally been recognized by the federal courts as the most important consideration in an Eleventh Amendment analysis prior to Hess, the Supreme Court's decision established it as the predominant factor for addressing such questions. The Fourth Circuit correctly rejected

the Ports Authority's claim that Hess has no application to single state entities. See footnote 5 in the Ristow opinion at App. A9 and Gray, 51 F. 3d at 431 & 432.

4. THE ADOPTION OF AN ACTUAL FINANCIAL ANALYSIS AS THE PROPER APPROACH FOR EXAMINING THE STATE TREASURY FACTOR

After removing any doubt about the importance of the state treasury factor in an Eleventh Amendment analysis, the Court provided considerable guidance in applying such factor. Hess, 130 L. Ed. 2d at 261-262. At the Fourth Circuit level and in their previous Petition for Certiorari in No. 94-428, the Ristows outlined how an actual financial examination in this case revealed that the South Carolina state treasury would not be responsible for paying any judgment in their favor. Their position was

based on Feeney and Jacintoport, cited earlier, as well as numerous other cases. See Petition in No. 94-428 at p. 25-30, 39-55. The Ristows cited the existence of insurance coverage and the other facts set forth on pages 14 and 17 of this Petition as evidence of such protection. See also Petition in No. 94-428 at p. 40.

In Jacintoport and Feeney, the Courts examined whether as a practical matter, the plaintiff's judgment would actually have to be satisfied from the state treasury. The Jacintoport Court's analysis concluded that any judgment could be satisfied by the Commission itself. Jacintoport, 762 F. 2d at 441. Such analysis determined that even the most favorable estimate of the plaintiff's damages would not reach one-tenth

of the Commission's surplus revenue in a good year. Jacintoport, 762 F. 2d at 441. The state's tertiary liability on the Commission's bonds was found to have only an ancillary effect on the treasury. Jacintoport, 762 F. 2d at 441-442.

The Feeney Court believed the financial factor favored the denial of immunity since the Authority could not pledge the credit of either state, could only borrow money in its own name, and no provision committed the state treasuries to satisfy any judgments. Feeney, 873 F. 2d at 631. The limited appropriation from the state treasuries requiring gubernatorial approval was felt to be a limited and optional obligation evidencing an intent to insulate the vast bulk of the treasury from the Au-

thority's debts. Feeney, 873 F. 2d at 631.

In deciding Hess, the Supreme Court clearly favored the actual financial analysis over the broad relationship approach used by the Third Circuit in Police Benevolent Association and the Fourth Circuit in its 1994 decision. The Court in the following passage contrasted the Port Authority's "anticipated and actual financial independence "[6] [emphasis added] with the burdens other entities place on their founding States:

> In Alaska Cargo Transport, Inc. V. Alaska R. Corp., 5 F 3d 378 (CA9 1993), for example, Eleventh Amendment immunity was accorded a thinly capitalized railroad that depends for its existence on a state-provided "financial safety net of broad dimension." Id., at 381. And

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[6] Hess, 130 L. Ed. 2d at 261.

in Morris v. Washington Metropolitan Area Transit Authority, 781 F. 2d 218 (CADC 1986), Eleventh Amendment immunity was accorded an interstate transit system whose revenues shortfall congress and the cooperating States anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits. See id., at 225-227. As the Morris court concluded:

"[W]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." Id., at 227. 20 There is no such requirement where the agency is structured, as the Port Authority is, to be self-sustaining. Cf. Royal Caribbean Corp. v. Puerto Rico Ports Authority, 973 F. 2d 8, 10-11 (CA1 1992) (Breyer, C.J.) (rejecting Eleventh Amendment immunity plea, despite Commonwealth's control over agency's executives, planning, and administration, where agency did not depend on Commonwealth financing for its income and

> covered its own expenses, including judgments against it)."

Hess, 130 L. Ed. 2d at 261.

The Supreme Court also rejected a financial nexus for Eleventh Amendment immunity based on the State's access to Authority surplus and profits and use thereof for projects. Hess, 130 L. Ed. 2d at 261-262. The Port Authority Trans-Hudson had argued that a judgment against it produced an effect equivalent to a judgment against the state because Authority surplus is dedicated to public projects which the State would otherwise have to fund if such surplus was used instead to pay a judgment. Hess, 130 L. Ed. 2d at 261-262. In light of this, the Authority believed it was unrealistic and artificial to distinguish the resources of the two. Hess, 130 L. Ed. 2d at 262.

Commenting on this argument, the Court stated as follows:

> "This reasoning misses the mark. A charitable organization may undertake rescue or other good work which, in its absence, we would expect the State to shoulder. But none would conclude, for example, that in times of flood or famine the American Red Cross, to the extent it works for the public, acquires the States' Eleventh Amendment immunity.21 The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of enterprise exceed receipts, is the state in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" --- both legally and practically --- then the Eleventh Amendment's core concern is not implicated."

Hess, 130 L. Ed. 2d at 262.

The foregoing discussion in Hess regarding actual financial independence and whether a state is in fact obligated to bear an indebtedness show a clear re-

jection of the symbiotic relationship approach and the establishment of an actual financial analysis as the proper method for addressing the state treasury factor. Furthermore, the Court has emphasized that the focus of the analysis should be on the entity's debts and expenditures and not on the use of profits and surpluses.

C. THE CONFLICT BETWEEN HESS AND THE FOURTH CIRCUIT'S DECISION

1. GENERAL OVERVIEW OF CONFLICT

As can be seen by reviewing footnote 4 of its opinion in Ristow and page 434 of its opinion in Gray, the Fourth Circuit does not believe Hess materially altered the methodology it has utilized for examining Eleventh Amendment questions. Such comments ignore the Supreme Court's clear rejection of control, its re-emphasis of the state treasury fac-

tor, and the aforementioned guidance it has provided in applying the treasury factor. The Fourth Circuit has simply reconstructed its opinion in an attempt to facially comply with Hess but avoid its substance.

The Fourth Circuit correctly recognized that Hess establishes both a legal and practical test[7] for examining the treasury factor. However, it then erred by seizing upon the Court's language with respect to the question of whether the state must bear the obligation being

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[7] Throughout this litigation, the Ristows have shown that both legally, by virtue of the absence of a continued funding obligation and the presence of statutory insulation language, and practically by virtue of the insurance coverage and the existence of the Authority's own assets and borrowing power, the state treasury will not be obligated to pay a judgment in their favor.

answered "no" in the practical sense and ignoring the substance of the Court's discussion on pages 261 and 262. The Court expressed a distorted view of the State's practical obligation completely at odds with Hess. Previously, the Fourth Circuit's analysis was founded on symbiotic relationships, and now it is grounded on the state's immersion in the Authority's financial affairs. The Court's new phraseology is merely a disguised way of talking about relationships and the theoretical bearing of indebtedness. The Fourth Circuit cannot shift the focus of its analysis from relationships to the actual bearing of indebtedness as the Supreme Court has directed.

2. THE CONFLICT BETWEEN HESS AND THE FOURTH CIRCUIT'S "SURPLUS" POSITION

The Fourth Circuit's immersion finding is founded on 1) the State's access to Ports Authority surplus and profits, and 2) the State's voluntary contributions for capital improvements and the BMW project. (App. A13-18) With respect to the State's access to Authority surplus, the Court noted that the legislature will not be able to withdraw net revenues if the surplus has been depleted by judgments. (App. A16-17) Also, the Ports Authority would be unable to utilize such surplus for its improvements and would be forced to depend on the State. (App. A17-18)

The Court's surplus rationale is virtually identical to the argument raised by the Port Authority Trans-

Hudson which is discussed and rejected by the Supreme Court on pages 261 and 262 of the Hess opinion (i.e. a judgment would reduce Authority surplus available to fund other projects thus requiring the state to fund them and producing an effect equivalent to a judgment against the state). In pointing out the fallacy of this argument, the Supreme Court noted that the proper focus is not on the use of profits or surplus but on losses and debts. Hess, 130 L. Ed. 2d at 262. Thus, the very reasoning utilized by the Fourth Circuit directly conflicts with the teachings of Hess.

In footnote 9 on page 7 of the opinion, the Fourth Circuit attempted to explain its deviation from the standards of Hess by presenting an irrelevant distinction and a confused theory of ac-

counting. (App. A17) Unlike Hess where some surplus is devoted to finance certain specific projects, the Ports Authority's surplus is subject to the unfettered discretion of the legislature thereby buttressing the Court's view that the surplus is the State's. (App. A17) Since Hess attached no significance as to who had access to the surplus and instead placed the focus on the losses and debts, the Ristows believe this distinction is irrelevant. The Court's rationale also conveniently overlooked the practical and legal separation of the Authority's revenues and assets from those of the State.

As to the belief that because of the State's $132 million in contributions the surplus is only semantic and the Authority is actually operating at a loss,

the Court once again ignored the practical and legal separation of Authority revenues and assets from the State's. By attempting to manufacture a loss on the basis of the State's contributions, the Fourth Circuit confused the concept of loss with that of net worth. Hess clearly placed the focus of the test on an entity's operational losses rather than its net worth.[8] Furthermore, the Fourth Circuit's "loss" interpretation fails to account for the substantial value of the assets owned by the Authority which undoubtedly result in a positive net worth for the entity. The

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[8] The Court's language on page 262 of Hess regarding expenditures exceeding receipts as well as its reference to operating deficits on page 261 when it is discussing Morris v. Washington Metropolitan Area Transit Authority, 781 F. 2d 218 (CADC 1986) show that the Court was talking about operational deficits.

Court's surplus rationale cannot be reconciled with Hess and directly conflicts with its teachings.

3. THE CONFLICT BETWEEN HESS AND THE FOURTH CIRCUIT'S "CONTRIBUTIONS" POSITION

In citing the State's voluntary contributions for capital improvements and the BMW project as support for its immersion theory, the Fourth Circuit has deviated from the substance of Hess decision. The test set forth in Hess is whether the state is obligated practically or legally to bear the resulting indebtedness should expenditures exceed receipts. Hess, 130 L. Ed. 2d at 262. It is not whether the state has made contributions to an entity. Indeed in Hess, New York and New Jersey had made contributions to the Authority in its early days, and a continued funding ob-

ligation existed. Hess, 130 L. Ed. 2d at 259. In Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), the state had made significant financial contributions to a school board, but immunity was denied.

The Fourth Circuit also failed to recognize South Carolina's contributions for improvements were voluntary. Previous case law has held that voluntary payments do not trigger Eleventh Amendment immunity. See Duckworth v. Franzen, 780 F. 2d 645, 650-651 (7th Cir. 1985); Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F. 2d 655, 661 (3rd Cir. 1989), cert. den. 493 U.S. 850, 110 S. Ct. 148, 107 L. Ed. 2d 107 (1989) and Bolden v. Southeastern Pennsylvania Transp. Authority, 953 F. 2d

807, 819 (3rd Cir. 1991), cert. den. 504 U.S. ___, 112 S. Ct. 2281, 119 L. Ed. 2d 206 (1992). Hess created one important exception to the foregoing rule in that the Court would find Eleventh Amendment immunity triggered by the voluntary payment of a judgment by the state treasury where such payment was necessary for the very survival of the entity. Hess, 130 L. Ed. 2d at 261. Such exception does not apply in this case.

The facts herein show the voluntary payment of a judgment in the Ristows' favor by the state treasury would not be necessary to insure Authority survival. There is sufficient insurance coverage, and the Authority has its own funds and the ability to borrow money. This practical treasury protection will be further discussed in Section II of this Pe-

tition. See also Petition in No. 94-428 at p. 40-43 & 48-49.

4. HESS AND THE FOURTH CIRCUIT'S CONFLICTING VIEWS OF SELF-SUFFICIENCY OR PRACTICAL DEPENDENCE

Noting the self-sufficiency of PATH, the Fourth Circuit used the combination of the State's voluntary contributions and access to surplus to conclude that the Ports Authority's is not self-sufficient. (App. A15-16) The Court's finding is completely at odds with the substance of the Supreme Court's discussion of self-sufficiency versus practical dependence on page 261 of the opinion. Once again, the Court is trying to shift the focus of the test from state treasury obligation to state financial immersion and relationship. A review of the Court's discussion about the contrast

between PATH and entities placing a heavy toll on their founding states shows the Court envisioned a situation of practical dependence much different from the one described by the Fourth Circuit.

On page 261, the Court compared PATH and facilities placing heavy tolls on their founders. As examples, the Court then cited a railroad in Alaska Cargo, cited earlier, which depended on a state-provided financial safety net for its existence, and an interstate transit system in Morris, cited earlier, having sizable operating deficits and being constantly dependent on funding from the States to meet these deficits. Hess, 130 L. Ed. 2d at 261. The Court noted the Morris Court's conclusion that "[w]here an agency is so structured

that, as a practical matter, if the agency is to survive, a judgment must expend itself against the state treasuries, common sense and the rational of the eleventh amendment require that sovereign immunity attach to the agency." Hess, 130 L. Ed. 2d at 261, quoting Morris, 781 F. 2d at 227.

The Ports Authority herein simply does not fall within the class of entities placing heavy fiscal tolls on the states as contemplated by the Supreme Court. Practically since 1959, the Ports Authority has been operating profitably. During its lifetime, the State has withdrawn a surplus of over $1.5 million. (App. A14) Unlike the situation in Morris, the State does not make contributions to cover any operating deficits.

Assuming the Ristows obtained a judgment against the Authority, the State would not be practically required to cover it to save the Authority because of the Authority's ample insurance coverage, the existence of its own funds, and the ability to borrow funds. See Section II for more discussion of the practical treasury protection. Regardless of the Ristows' judgment, the Ports Authority will survive. To grant Eleventh Amendment immunity under the circumstances defies economic reality. The Fourth Circuit's position on practical dependence and lack of self-sufficiency is not compatible with the Supreme Court's view and must be rejected.

5. THE FOURTH CIRCUIT'S FAILURE TO CONSIDER INSURANCE

In its practical analysis, it is very peculiar that the Fourth Circuit completely ignored the existence of insurance coverage.[9] When addressing the bearing of indebtedness from the practical standpoint, the existence of insurance would appear to be an extremely relevant consideration. In the Bolden, Fitchik, and Royal Caribbean cases cited earlier, the existence of insurance was discussed.

In their previous Petition, the Ristows contended that the broad view expressed by the Court in its 1994 decision which did not consider the existence of insurance had the undesirable

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[9] This is consistent with the Court's 1994 decision wherein it failed to deal with insurance as well.

effect of conferring the benefits of sovereign immunity upon Lloyds of London, a private insurance consortium not connected with the State. See Petition in No. 94-428 at p. 37 & 38. Such failure to consider insurance practically extends the Eleventh Amendment protection beyond the Amendment's intended scope and purpose, i.e. to protect the States and their treasuries. The Fourth Circuit's ignoring of insurance in its more recent decision renews this concern and is especially troublesome in light of Justice Stevens' comments in his concurring opinion.

Justice Stevens joined the opinion authored by Justice Ginsburg without reservation but wanted to identify an additional consideration which motivated his vote, i.e. the establishment of jus-

tice. Hess, 130 L. Ed. 263-264. He discussed how the Court's expansive Eleventh Amendment jurisprudence is misguided as a matter of constitutional law, has worked as an engine of injustice, and has been the subject of much scholarly criticism. Hess, 130 L. Ed. 2d at 264. When confronted with the question of whether the doctrine should be extended or contained, a court should give controlling weight to the establishment of justice. Hess, 130 L. Ed. 2d at 264. By ignoring the insurance coverage, the Fourth Circuit has failed to consider a relevant treasury protection factor, has effectively expanded the Amendment's scope to protect a private insurance entity, and has created the very injustice Justice Stevens cautioned against in his opinion.

D. SUPREME COURT RULE 10 CONSIDERATIONS

Under Supreme Court Rule 10.1(c), one of the criteria for granting a petition for certiorari is when a United States Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court. The foregoing discussion has demonstrated the existence of a clear conflict between the Fourth Circuit's analysis of the state treasury factor herein and the Supreme Court's treasury teachings set forth in Hess.[10] Since Eleventh Amendment immunity is an important question of federal constitutional law and the state treasury factor is the

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[10] As will be discussed in Section III, a conflict also exists between the Fourth Circuit's view of control in this case and the dissent's position on control.

predominant factor in analyzing this question, the conflict presents a substantial question and "special and important reasons" which would justify certiorari. See Supreme Court Rule 10.1 and Rice v. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 The case involves principles whose settlement is important to the public, and a conflict which is real. Accordingly, pursuant to NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed 479 (1951), certiorari is appropriate and necessary.

Given the substantial number of cases arising in the Eleventh Amendment area, the issue raised herein is not episodic but is frequently seen in the federal system. The Fourth Circuit's decision has also created a conflict

over the respondent's status with the Southern District of New York in the Doris case. Throughout this litigation, the Ristows have believed Doris was correctly decided and should have been followed. Finally, as previously mentioned and will be further discussed in Part II, the Ristows' treasury protection position has substantial merit.

In view of the foregoing considerations, the Supreme Court should grant certiorari in this matter. The Ristows will now outline the merits of the protection of the state treasury in greater detail, and will finally address state control or autonomy.

II. THE SOUTH CAROLINA STATE TREASURY IS NOT OBLIGATED TO BEAR A POTENTIAL JUDGMENT IN THE RISTOWS' FAVOR.

A. INTRODUCTION

Throughout this litigation, the Ristows have demonstrated the legal and practical protection of the state treasury from a judgment in their favor.[11] Since the Fourth Circuit admitted the state treasury is not legally obligated to pay a judgment in their favor, the Ristows can now dispense with the legal aspects of their protection analysis and concentrate on the practical.

B. INSURANCE COVERAGE

On their personal injury claims, the maximum amount the Ristows could recover is the sum of $430,000.00 plus costs, while they could recover $75,000.00 plus costs on their alternative breach of contract claim. These are the amounts

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[11] Treasury protection was previously discussed on pages 39-55 of the Ristows' Petition in No. 94-428.

of damages prayed for by the Ristows in their Complaint. See App. F22-23. At appendix page 4 in its Brief in Opposition to Certiorari in No. 94-428, the Ports Authority disclosed for the first time in this litigation a coverage limit of "US $20,000,000.00." Assuming the Authority has correctly identified policy limits, the possibility of any excess liability is a moot point.

C. THE PORTS AUTHORITY'S SEPARATE FUNDS

In its responsive brief on reconsideration, the Ports Authority disclosed for the first time in this litigation the existence of a $25,000.00 deductible. Since the Ports Authority has its own assets and the ability to raise funds, the $25,000.00 deductible does not impair the state treasury. The Ports Authority has its own bank ac-

counts and owns property in its own name. See S.C. Code Ann., Sec. 54-3-140 (2) and 54-3-1020 at App. E11, 52-53. The Ports Authority can generate funds in a variety of ways some of which are as follows:

1) licensing fees; S.C. Code Ann., Sec. 54-3-140 (14) at App. E17-18;

2) rent; S.C. Code Ann., Sec. 54-3-140 (2) at App. E11;

3) borrowing; S.C. Code Ann., 54-3-140 (2) and (9) at App. E11, 14-15;

4) funds from the counties of Beaufort, Charleston, and Georgetown; S.C. Code Ann., 54-3-130 (5) at App. E8-9;

5) funds from others; S.C. Code

Ann., Sec. 54-3-1030 at App. E53.

Since 1959, the State has not made an annual appropriation for the operation of the Authority. (App. A12-13) On the other hand, the Authority has generated considerable revenue having distributed excess earnings of $1,500,000.00 to the State. (App. A14) Thus, the Ports Authority clearly has its own separate funds and the ability to raise funds which could be used to pay any judgment in the Ristows favor not covered by insurance. It would not depend upon state treasury payment of the Ristows' judgment for its survival.

III. THE FOURTH CIRCUIT'S VIEW OF THE CONTROL FACTOR REGARDING THE PORTS AUTHORITY CONFLICTS WITH THE POSITION OF THE DISSENT IN HESS AS TO CONTROL.

Since disagreement exists in the Su-

preme Court regarding the importance of control, the Ristows feel it is important to discuss this issue. The dissent, of course, believes control should be the predominant factor as indicated by the following passage from Justice O'Connor's dissenting opinion:

> "The critical inquiry, then, should be whether and to what extent the elected state government exercises oversight over the entity. If the lines of oversight are clear and substantial - for example, if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings - then the entity should be deemed an arm of the State for Eleventh Amendment purposes." Hess, 130 L. Ed. 2d at 268-269.

From a review of the comment in footnote 10 of the Ristow opinion, it is apparent that the Fourth Circuit continues to believe the control or autonomy factor favors a finding of Eleventh

Amendment immunity. In its 1994 decision, the Fourth Circuit admitted autonomy considerations were mixed but determined the Ports Authority ultimately answers to the State. (App. D20-23) However, the Fourth Circuit's view fails to show clear and substantial oversight over the Ports Authority's activities by the State and thus conflicts with the dissent's control test which focuses on such oversight.

An examination of the statutes pertaining to the Ports Authority reveals the absence of meaningful oversight on the part of the State. Sec. 54-3-140(1) gives the Authority the powers of a body corporate, allows it to sue and be sued, make contracts, adopt and use a common seal. (App. E11) Pursuant to Sec. 54-3-140(2), the Authority may acquire

and dispose of real and personal property. (App. E11) The Authority may pay its own expenses and incur indebtedness on its own under Sec. 54-3-140(8) & (9). (App. E14-15) Sec. 54-3-140(5) allows the Authority to hire and fire employees at will. (App. E13) As disclosed by Secs. 54-3-20, 54-3-30, and 54-3-40, the Authority operates like an ordinary business corporation. (App. E3-4)

In Hess, the parent states appointed and removed the commissioners who governed PATH. Hess, 130 L. Ed. 2d at 268-269. The governor of each could veto actions of commissioners from that State including actions taken as PATH directors. Hess, 130 L. Ed. 2d at 253. Given these powers, the dissent felt sufficient state control existed to support a

finding of immunity for PATH. Hess, 130 L. Ed. 2d at 269-270.

Although the board members of the Ports Authority are appointed by the governor of South Carolina, pursuant to Sec. 54-3-20, South Carolina does not retain a statutory veto or approval power over the Authority's undertakings. (App. E3) A review of the statutory sections related to the Ports Authority reveals considerable autonomy with no clear lines of oversight. Thus, the Fourth Circuit's view of control clearly conflicts with the test cited by the dissent in Hess.

CONCLUSION OF PETITION

In this petition, the Ristows have demonstrated the existence of important considerations which necessitate the granting of certiorari in this case.

They have also shown that the Ports Authority is not entitled to Eleventh Amendment immunity since the state treasury is not practically obligated to bear a judgment in their favor. For the reasons recited in this petition, the Ristows' petition for certiorari should be granted and it is respectfully requested that the Court grant the same.

Respectfully submitted

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Dated: September 14, 1995

(2)

Supreme Court, U.S.
FILED

95-456 SEP 18 1995

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRED W. RISTOW; SUSAN M. RISTOW,

Plaintiffs-Appellants,

v.

SOUTH CAROLINA PORTS AUTHORITY, an agency of the State of South Carolina; THE SS UNKNOWN, an unknown ocean going ship,

Defendants-Appellees.

No. 93-1861

On Remand from the
Supreme Court of the United States.
(No. 94-428)

Submitted: December 1, 1994

Decided: July 20, 1995

Before WILKINS, Circuit Judge, and
SPROUSE and CHAPMAN, Senior
Circuit Judges.

Affirmed by published opinion. Senior Judge Sprouse wrote the opinion, in which Judge Wilkins and Senior Judge Chapman joined.

COUNSEL

Leonard William Schulz, Big Bend, Wisconsin, for Appellants. William H. Vaughan, Jr., VAUGHAN & LAWRENCE, P.A., Charleston, South Carolina, for Appellees.

OPINION

SPROUSE, Senior Circuit Judge:

On June 13, 1994, we affirmed the decision of the United States District Court for the District of South Carolina dismissing this personal injury action against the South Carolina Ports Authority on the basis of Eleventh Amendment immunity. Ristow v. South Carolina Ports Auth., 27 F. 3d 84 (4th Cir. 1994) ("Ristow I"). The Supreme Court of the

United States granted certiorari and remanded to us for reconsideration under the principles announced in Hess v. Port Authority Trans-Hudson, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994). We have done so and under those principles again affirm. The relevant facts are restated.

Fred W. Ristow is a long-haul truck driver. On December 20, 1988, he drove a load of steel pipes to the South Carolina State Ports Authority ("Ports Authority") terminal in Charleston, South Carolina. While Ristow was standing atop a bundle of pipes on his truck, a forklift operator employed by the Ports Authority began to lift the truck's cargo. Ristow was forced to jump from the truck and suffered serious injuries.

In December 1991, Ristow and his

wife brought suit in federal district court in South Carolina against the Ports Authority,[1] asserting federal jurisdiction based on diversity of citizenship and admiralty. The Ristows claimed negligence, Fred demanding compensation for his injuries and his wife alleging loss of consortium. They also sued for breach of contract in connection with an alleged $75,000 settlement offer. With the parties' consent, this case was referred to a United States Magistrate pursuant to 28 U.S.C.A. Sec. 636(c) (1993). After briefing and a

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[1]The Ristows also named the vessel the SS Unknown as a defendant in the complaint. The actual name and registry of this ship, onto which Ristow's cargo was to be loaded, were never identified, and the ship was never served notice of the suit. Accordingly, the SS Unknown was dismissed as a defendant.

hearing, the magistrate granted the Ports Authority's motion to dismiss the case on the ground that the Ports Authority was immune from suit under the Eleventh Amendment. The Ristows appeal.[2]

I

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The plain language of the amendment pro-

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[2]See 28 U.S.C.A. Sec. 636(c)(3) (1993) (authorizing direct appeals from civil judgments entered in the district court by United States Magistrates presiding with consent of the parties).

vides immunity only for suits against "one of the United States." Nearly fifty years ago, however, the Supreme Court stated, "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).

As we stated in Ristow I, the Supreme Court has held that a suit against an entity that is an arm of the state may also be barred by the Eleventh Amendment. See e.g., Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). The Ports Authority maintains that it is a state entity-more particu-

larly, that it is the alter ego of the State of South Carolina-and claims Eleventh Amendment immunity from suit. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979), the Supreme Court identified six factors considered useful in determining Eleventh Amendment immunity issues: (1) the characterization of the entity by the language of its creating statutes; (2) the origin of the entity's funding; (3) whether the state is financially responsible for the liabilities and obligations incurred by the entity; (4) the source of power to appoint the entity's officers or members; (5) whether the function performed by the entity is traditionally state or municipal; and (6) whether the entity's actions are

subject to a veto by the state.[3] The Court in Hess, however, made it abundantly clear that one factor dominates the inquiry-whether the state treasury is "obligated" for the "losses and debts" of the entity under scrutiny. This is so because the "impetus" for the Eleventh Amendment is "the prevention of federal court judgments that must be paid out of state's treasury." Hess,

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[3]Distilling the Lake Country Estates criteria, this court has stated the formula as a four-part, non-exclusive inquiry: (1) whether the state treasury will be responsible for paying any judgment that might be awarded; (2) whether the entity exercises a significant degree of autonomy from the state; (3) whether it is involved with local versus statewide concerns; and (4) how the entity is treated as a matter of state law. Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n, 822 F.2d 456, 457-58 (4th Cir. 1987).

130 L. Ed. 2d at 260.[4] The Supreme Court's Hess teachings, of course, guide our inquiry on this remand.[5]

In Hess, the Court said:

> The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the ex-

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[4]Before Hess, this court had already identified the state treasury factor as the most important consideration. Ram Ditta, 822 F. 2d at 457. With the exception of the Court's renewed emphasis on state sovereignty, "we do not believe that Hess...materially altered the Eleventh Amendment analysis we formulated in Ram Ditta." Gray v. Laws, 51 F.3d 426, 434 (4th Cir. 1995). Because our decision in this case turns on the Hess Court's guidance in applying the treasury factor, we will not attempt to interpret the Court's language to say anything different on this point than the careful discussion provided in Gray, 51 F.3d at 431-34.

[5]In Hess, the Court analyzed a multistate entity created by the states of New York and New Jersey with the consent of the United States Congress. The Hess majority cited the entity's multistate character as a significant factor mili-

> penditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No"-both legally and practically-then the Eleventh Amendment's core concern is not implicated.

Hess, 130 L. Ed. 2d at 262 (emphasis added). The dissent characterized the majority's opinion as holding "[i]f a State does not fund judgments against an entity, that entity is not within the ambit of the Eleventh Amendment, and suits in federal court may proceed unimpeded." Hess, 130 L. Ed. 2d at 265.[6]

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tating against a finding of Eleventh Amendment immunity. The Ports Authority urges us to hold that Hess has no application to an entity, like itself, created by a single state. To that, we need only reiterate our recent rejection of that reasoning. Gray, 51 F. 3d at 432-33.

[6]While there may be a superficial difference in the language in which the de-

If the Hess test were as sharply delineated as its dissenting opinion suggests, our resolution of the immunity issue would be simple. We find nothing in the South Carolina statutes or case law imposing liability per se on the state for judgments against its Ports Authority. The South Carolina Code does not obligate the General Assembly to appropriate funds for the operation of the Ports Authority nor does it make the

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finitive principle is couched in the majority and dissenting opinions, in our view there is not a principled difference in meaning. The dissent characterizes the majority's holding as requiring a finding that a state would fund judgments against an entity. The majority speaks in terms of obligations "to bear and pay the resulting indebtedness (emphasis added). Phenomenally, we think this language is parallel. Before an indebtedness rises to the status of an obligation, it, of course, must be reduced to a judgment.

state explicitly responsible for judgments against the Ports Authority. The only clear source of money from which a judgment would legally be required to be paid is the revenue retained by the Ports Authority in its bank accounts, see S.C. Code Ann. Sec. 54-3-1020 (Law. Co-op. 1977), or funds borrowed by the Ports Authority under the authority of Sec. 54-3-1010.

As we understand the Hess majority opinion, however, the inquiry it compels is somewhat broader than suggested by the dissent. The majority, in the language quoted above, requires us to employ not only a legal test, but a practical analysis. Considering the practical effect of a putative Ristow judgment on the state treasury sways us to conclude that the Ports Authority,

from an Eleventh Amendment perspective, is the alter ego of the State of South Carolina.

The South Carolina legislature created the Ports Authority in 1942 and heavily supported it through direct annual appropriations through 1959. While, as Hess makes clear, initial funding carries minimal weight in the controlling Eleventh Amendment equation, this is the first frame of a continuing picture that shows the state immersing itself in the pecuniary affairs of the Ports Authority. Periodically since 1959, South Carolina has decided that extensive capital improvements were necessary to maintain the Ports Authority as a viable player in national and international trade. It has authorized and issued several series of general ob-

ligation bonds totalling $132 million for that purpose, including $32 million issued during the pendency of this action. The resulting funds were deposited in the Ports Authority's account. All of the indebtedness, however, both principal and interest, is repaid out of South Carolina's general tax revenues.

Conversely, South Carolina has withdrawn over $1.5 million from the Ports Authority during its lifetime. It has done so under South Carolina law that provides, "[a]ny and all net revenues or earnings not necessary or desirable for operation of [the Ports Authority's] business shall be held subject to the further action of the General Assembly." S.C. Code Ann. Sec. 54-3-1020 (Law. Co-op. 1977). Thus, the Ports Authority is not legislatively structured to retain

unlimited profits or surplus. Rather, it is the South Carolina General Assembly that has the power to determine the Ports Authority balance available to meet operational costs, presumably including funds necessary to pay putative judgments against it. On the other hand, the state has shown its willingness to contribute to the maintenance and expansion of the Ports Authority, as evidenced by the $132 million in capital improvements paid ultimately from the state treasury.[7]

All of this convinces us that, unlike Port Authority Trans-Hudson, the entity considered in Hess, the Ports Au-

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[7]Another example of the state's heavy financial involvement with the Ports Authority is the implementation of an agreement between South Carolina and the German automaker BMW in 1992. BMW agreed to construct a manufacturing

thority is not self-sufficient.[8] It is true that a judgment against the Ports Authority cannot be legally enforced against the state. The practical effect of South Carolina's treatment of the fiscal affairs of the Ports Authority, however, definitively implicates the

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plant in Spartanburg County. To purchase the land and prepare the site for BMW's use, the state transferred over $40 million from its treasury to the Ports Authority so that the Ports Authority could acquire the land on behalf of the state.

[8]It would be difficult to overstate the Court's reliance on the self-sufficiency of the Port Authority Trans-Hudson. See Hess, 130 L. Ed. 2d at 261 (citing the Port Authority's "actual financial independence-its long history of paying its own way"); id. at 259 ("for decades [the Authority] has received no money from the States")id. at 262 (declining "to spread an Eleventh Amendment cover over an agency that consumes no state revenues") id. at 263 ("[T]he Port Authority is financially self-sufficient; it generates its own revenues, and it pays its own debts.").

state treasury. Obviously, the legislature will not be able to withdraw net revenues "not necessary or desirable for operation" if the Ports Authority's operational funds have been depleted by judgments against it.[9] Likewise, to the

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[9]We, of course, are cognizant of the Supreme Court's admonition that "[t]he proper focus is not on the use of profits or surplus, but rather is on losses and debts." Hess, 130 L. Ed. 2d at 262. In Hess, the Port Authority devoted some of its surplus to finance certain public projects that would otherwise be funded by its member states. Here, the facts are significantly different. Rather than having surplus allotted to specific projects, the Ports Authority surplus is subject to the unfettered discretion of the South Carolina General Assembly, buttressing our conclusion that such "surplus" was effectively the state's in the first instance. This conclusion is also grounded on the fact that this money is surplus only in a semantic sense. The state has effectively contributed $132 million to the Ports Authority for capital improvement. Regardless of the technicalities of accounting, for Eleventh Amendment purposes this appears to us to mean that the Authority operates at a loss.

extent that a judgment would deplete its resources, the Ports Authority would be unable to utilize earnings for necessary capital improvements, and so would continue to depend on the state treasury for these required expenditures. To deny Eleventh Amendment immunity in these circumstances would ignore economic reality.

To summarize, in the strictest sense there is no legal obligation by the State of South Carolina to cover the Ports Authority's debts. The state, however, provides whatever economic support is necessary over and above the Port Authority's net revenues to insure its continued vitality. Conversely, it takes back any portion of the Authority's net revenues, which in its legislative judgment, is "not necessary or de-

sirable" for the Ports Authority's operation. Practically, then a judgment against the Ports Authority involves the "core concern" of the Eleventh Amendment-the ebb and flow of funds into and out of South Carolina's treasury. We, therefore, conclude that the South Carolina State Ports Authority is entitled to Eleventh Amendment immunity from suit.[10]

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[10]In our view, Hess, despite emphasizing the "state treasury" factor as critical, left standing the other Lake Country factors where the "state treasury" issue presents a close question. See Gray v. Laws, 51 F. 3d 426, 432 (4th Cir. 1995) (despite consigning remaining Lake Country factors to lesser prominence, Hess retained them as relevant). We think consideration of the "core" issue here alone mandates the result we have reached, but, to the extent the other Lake Country factors apply, they, on balance, counsel in favor of immunity for the Ports Authority.

II

Alternatively, the Ristows ask us to remand their case to the district court for a determination of whether they have alleged claims founded on admiralty law and whether the Ports Authority has waived its sovereign immunity by entering into this federally regulated area. See Parden v. Terminal Ry., 377 U.S. 184, 190 (1964), overruled by Welch v. Texas Dep't of Highways & Public Transp., 483 U.S. 468 (1987). They assert that Congress possesses the power to abrogate Eleventh Amendment immunity and has done so in the context of admiralty law. The Supreme Court in Welch, however, explicitly stated that "the Court has held that the [Eleventh] Amendment bars suits in admiralty against the States, even though such

suits are not strictly speaking, `suits in law or equity.'" Id. at 472-73. The Court went on to note: "In Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), eight Members of the Court agreed that the Eleventh Amendment bars suit in admiralty brought to recover damages from the State or its officials." Id. at 473 n.3 (citations omitted). Accordingly, we conclude that a suit for money damages by the Ristows against the Ports Authority grounded in admiralty is likewise barred by the Eleventh Amendment.

III

The decision of the magistrate judge, is therefore, affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and SUSAN M. RISTOW, his wife,

Plaintiffs,

Civil Action No. 2:91-3677-2J

-versus-

O R D E R

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and the SS Unknown, an unknown ocean going ship,

Defendants.

This personal injury case and controversy is before the undersigned United States Magistrate Judge on consent of the parties to conduct all further proceedings and order the entry of final judgment. 28 U.S.C. Sec. 636(c).

On December 10, 1991, the plaintiffs, proceeding pro se,[1] filed this action

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[1] The plaintiffs subsequently retained counsel in Wisconsin, their home state, as well as local counsel.

seeking damages for personal injuries sustained by Fred Ristow while he assisted in the unloading of a cargo of steel pipe at the docks operated by defendant South Carolina State Ports Authority (SPA) and for the resulting loss of consortium by his wife, Susan M. Ristow. The plaintiffs assert jurisdiction exists in this court by virtue of diversity of citizenship and admiralty. 28 U.S.C. Secs. 1332, 1333.

On February 3, 1992, the defendant SPA moved to dismiss the action on the ground that the court lacks jurisdiction over the subject matter because SPA is an agency of the State of South Carolina and the action against SPA is in reality an action against the State of South Carolina by a citizen of another state precluded by virtue of the eleventh

amendment to the Constitution of the United States.[2]

A hearing was convened in Charleston, South Carolina, on July 30, 1992. The parties thoroughly briefed the issues and submitted affidavits in support of their positions. The plaintiff argued that the SPA is not the alter ego or agency of the state and, consequently, is not entitled to eleventh amendment protection, and the defendant took the contrary position.

A review of the record and relevant case law indicates that the defendant's motion is meritorious and this suit is barred by eleventh amendment to the

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[2] SPA also asserts that it is not a citizen for purposes of diversity jurisdiction. The court need not reach that argument in light of the merits of the eleventh amendment immunity argument.

United States Constitution.[3]

The SPA is a state agency of South Carolina, created by an Act of the General Assembly now codified at S.C. Code Ann., Sec. 54-3-10 et. seq. (Law. Co-op. 1976). Accordingly, it has been found to be entitled to raise eleventh amendment immunity and is not a "citizen" subject to diversity jurisdiction. See, South Carolina State Ports Authority v. Seaboard Airline R.R. Co., 124 F.Supp. 533 (D.S.C. 1954); Coakley v. South Carolina State Ports Authority, D.S.C. Case No. 2:87-1442-2 (UP 1988).

The Ristows' complaint states a claim

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[3] Amendment 11 - Suits against States
The judicial power of the United States shall not construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

of negligence against the SPA. Tort actions against the State of South Carolina are actionable under the South Carolina Tort Claims Act, S.C. Code Ann., Sec. 15-78-10, et. seq. (Law. Co-op. 1986), in a court of the State of South Carolina. This Act expressly includes state agencies such as SPA and makes clear that the General Assembly intended to exercise immunity from liability in suit except as waived by the Act. S.C. Code Ann., Secs. 15-78-40, 15-78-20(b) (Law. Co-op. 1986).

The defendant, South Carolina State Ports Authority, is entitled to the immunity from suit afforded by the eleventh amendment and jurisdiction over it does not lie in this court. Therefore, its motion to dismiss is granted. Further, as the plaintiffs have not served

the other defendant, the SS Unknown an unknown ocean going ship, within one hundred and twenty (120) days after the complaint was filed, this defendant will be dismissed from the action pursuant to Rule 4(j) of the Federal Rules of civil Procedure, thus ending the entire action.

IT IS SO ORDERED.

/s/ Robert S. Carr
ROBERT S. CARR
UNITED STATES MAGISTRATE JUDGE

Charleston, South Carolina

September 2, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and SUSAN M. RISTOW, his wife,

Plaintiffs,

-vs-

ORDER
Civil Action No.
2:91-3677-2J

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and the SS Unknown, an unknown ocean going ship,

Defendants.

This court issued an Order dated September 2, 1992. By error, the notice appropriate for matters subject to review by a district judge was attached to the Order, and a Notice of Filing appropriate for matters subject to such review was mailed to counsel of record. The Plaintiff filed a document entitled "Plaintiff's Objections to Report, Rec-

ommendations and Order of Magistrate" in accordance with such notices.

This court scheduled a hearing. The defendant South Carolina State Ports Authority offered a factual affidavit. The Plaintiffs advised the court that they intended to appeal. In order to prevent injustice, the court will now treat the "Plaintiff's Objections to Report, Recommendations and Order of Magistrate" as a motion to alter judgment under Rule 59 (e) of the Federal Rules of Civil Procedure and deny such motion. Plaintiffs are advised that this Order is final and is dispositive unless appeal to the United States Fourth Circuit Court of Appeals is effected within thirty (30) days after this Order.

The "Plaintiff's Objections to Report, Recommendations and Order of Magis-

trate," treated as a motion to alter judgment under FRCP 59 (e), is denied based upon the same reasons as stated in the September 2, 1992 order.

/s/ Robert S. Carr
Robert S. Carr
United States Magistrate Judge

June 10, 1993
Charleston, South Carolina

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SUPREME COURT OF THE UNITED STATES

No. 94-428

FRED W. RISTOW, ET UX.,

Petitioner

v.

SOUTH CAROLINA PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of Hess

v. Port Authority Trans-Hudson Corporation, 511 U.S. ____ (1994).

IT IS FURTHER ORDERED that the petitioners, Fred W. Ristow, et ux. recover form South Carolina Ports Authority, et al. Three Hundred Dollars ($300.00) for their costs herein expended.

November 28, 1994

WILLIAM K. SUTER

CLERK OF THE SUPREME
COURT OF THE UNITED STATES

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(VACATED BY SUPREME COURT)

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FRED W. RISTOW; SUSAN M. RISTOW,

Plaintiffs-Appellants,

V. No. 93-1861

SOUTH CAROLINA PORTS AUTHORITY, an agency of the State of South Carolina; THE SS UNKNOWN, an unknown ocean going ship,

Defendants-Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Robert S. Carr, Magistrate Judge. (CA-91-3677-2-2J)

Argued: March 9, 1994

Decided: June 13, 1994

Before WILKINS, Circuit Judge, and SPROUSE and CHAPMAN, Senior Circuit Judges.

Affirmed by published opinion. Senior Judge Sprouse wrote the opinion, in which Judge Wilkins and Senior Judge Chapman joined.

COUNSEL

ARGUED: Leonard William Schulz, Big Bend, Wisconsin, for Appellants. William H. Vaughan, Jr., VAUGHAN & LAWRENCE, P.A., Charleston, South Carolina, for Appellee.

OPINION

SPROUSE, Senior Circuit Judge:

Fred W. Ristow is a long-haul truck driver. On December 20, 1988, he drove a load of steel pipes to the South Carolina State Ports Authority ("Ports Authority") terminal in Charleston, South Carolina. While Ristow was standing atop a bundle of pipes on his truck, a forklift operator employed by the Ports Authority began to lift the truck's cargo. Ristow was forced to jump from the truck and suffered serious injuries. The Ports Authority notified

its insurance carrier, Lloyds of London, of the incident. The Ports Authority and Lloyds retained Carter & Co., a local insurance adjustment firm, to represent their interests. Ristow claims that an employee of Carter & Co. offered him and his wife a $75,000 settlement which they accepted, but Carter & Co. refuses to pay the $75,000.

In December 1990, Ristow and his wife brought suit in federal district court in South Carolina against the Ports Authority,[1] asserting federal ju-

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[1] The Ristows also named the vessel the SS Unknown as a defendant in the complaint. The actual name and registry of this ship, onto which Ristow's cargo was to be loaded, were never identified, and the ship was never served notice of the suit. Accordingly, the SS Unknown was dismissed as a defendant.

risdiction based on diversity of citizenship and admiralty. The Ristows claimed negligence, Fred demanding compensation for his injuries and his wife alleging loss of consortium. They also sued for breach of contract in connection with the $75,000 settlement offer. With the parties' consent, this case was referred to a United States Magistrate pursuant to 28 U.S.C.A. Sec. 636(c) (1993). After briefing and a hearing, the magistrate granted the Ports Authority's motion to dismiss the case on the ground that the Ports Authority was immune from suit under the Eleventh Amendment. The Ristows appeal.

I

The Eleventh Amendment to the United States Constitution provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The plain language of the amendment only provides immunity for suits against "one of the United States." Nearly fifty years ago, however, the Supreme Court stated, "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co. v. Department of Treasury, 332 U.S. 459, 464 (1945). The Supreme Court has subsequently made clear that a suit

against an entity that is an arm of the state may also be barred by the Eleventh Amendment. See e.g., Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

In this case, the Ports Authority maintains that it is a state entity-more particularly, that it is the alter ego of the State of South Carolina. It claims Eleventh Amendment immunity from suit. In Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n, 822 F.2d 456, 457-58 (4th Cir. 1987), we set forth the following four-part, non-exclusive inquiry for determining when an entity is the alter ego of a state for Eleventh Amendment purposes: (1) whether the state treasury will be responsible for paying any judgment that might be awarded; (2) whether the entity exer-

cises a significant degree of autonomy from the state; (3) whether it is involved with local versus statewide concerns; and (4) how the entity is treated as a matter of state law. The existence of Eleventh Amendment immunity is a question of law, and the facts to be considered in applying the Ram Ditta factors to the Ports Authority are undisputed. See United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). We, therefore, consider this immunity issue de novo.

A

The first Ram Ditta factor, the responsibility of the state treasury for the judgment, is generally the most important. This notion stems from the Supreme Court's statement in Ford Motor Co. that the state is the real party in

interest "when the action is in essence one for the recovery of money from the state." Ford Motor Co., 323 U.S. at 464. Here, to determine whether a tort recovery from the Ports Authority would in essence be one from the state, it is important to understand the role of the state treasury in the formation and operation of the Ports Authority. The Ports Authority was created by the State of South Carolina in 1942, and the state's General Assembly appropriated $750,000 in initial capital expenditures and maintenance costs. Annual appropriations of funds continued through 1959. While the Ports Authority no longer receives direct funding for its daily operations from the state, the General Assembly continues to make annual appropriations to pay the principal and in-

terest on the $132,000,000 in general obligation bonds issued over the years to finance capital improvements for the Ports Authority. It is clear that the Ports Authority owes its very existence and current financial position to the state's coffers.

The close relationship has extended beyond the initial formation of the Ports Authority. Under South Carolina law, "[a]ny and all net revenues or earnings not necessary or desirable for operation of [the Ports Authority's] business shall be subject to the further action of the General Assembly." S.C. Code Ann. Sec. 54-3-1020 (Law. Co-op. 1977). Under this authority, the State of South Carolina has withdrawn over $1.5 million in funds from the Ports Authority to the state treasury since

1942. In 1992, the State entered into an agreement with BMW under which the German automaker would construct a manufacturing plant in Spartanburg County. To purchase the land and prepare the site for BMW's use, the state transferred over 40 million from its treasury to the Ports Authority so that the Ports Authority could acquire the land on behalf of the state. The state's withdrawal of excess Ports Authority funds and its commingling of state funds with those of the Ports Authority in transactions like the BMW transaction are a strong indication that the funds of the Ports Authority belong to the state and that a tort recovery out of those funds would constitute one from the state treasury.

Without denying these facts, the Ris-

tows contend nonetheless that numerous other factors support a finding that a recovery in this case would not be paid out of the state treasury. In particular, the appellants rely on Sec. 54-3-140(9) of the South Carolina Code which provides:

> In order to enable it to carry out the purposes of this chapter, the Authority . . . [m]ay apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidence of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall be secured by the faith, credit or taxing power of the State, or any political subdivision thereof[.]

S.C. Code Ann. Sec. 54-3-140(9) (Law.

Co-op. 1977) (emphasis added). The Ristows assert that the phrase "no indebtedness of any kind" means precisely what it says: the State of South Carolina may not be held responsible for any debt, including money owed by the Ports Authority due to a tort recovery against it. Such an interpretation would insulate the state treasury from any payment of a recovery in favor of the Ristows in this case. We are unpersuaded.

The Ristows' view of 54-3-140(9) cannot be squared with the language and structure of the other parts of the South Carolina Code relating to the fiscal prerogatives and responsibilities of the Ports Authority. Subsection (9) solely concerns the power of the Ports Authority to borrow money from agencies of the United States government. Other

statutory provisions enable the Ports Authority to incur debt generally but contain no debt insulation provisions. For example, Sec. 54-3-140(2)[2] empowers the Ports Authority to mortgage or lease real and personal property but does not insulate the state from any indebtedness arising from such mortgages or leases, nor does it refer to Sec. 54-3-140(9). Similarly, Sec. 54-3-1010 [3] enables the Ports Authority to issue bonds to finance its operations. No language in Sec. 54-3-1010 shields the state from responsibility for funds owed under such debt financing, nor is there any cross-reference to Sec. 54-3-140(9).

The Ristows also make an "insurance"

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[2] S.C. Code Ann. Sec. 54-3-140(2) (Law. Co-op. 1977).

[3] S.C. Code Ann. Sec. 54-3-1010 (Law. Co-op. 1977).

argument in asserting that the first Ram Ditta factor compels a finding in their favor. They claim that the Ports Authority is covered by a Lloyds of London policy that is large enough to satisfy the $430,000 in damages and costs which they seek. Further, they argue, even should the policy not cover the entire tort judgment, any excess liability would be paid by the Ports Authority, not the state treasury. The Ristows point out that the South Carolina Code does not obligate the General Assembly to appropriate funds for the operation of the Ports Authority nor does it make the state explicitly responsible for judgments against the Ports Authority. The only clear source of money out of which a judgment would be paid is the revenue retained by the Ports Authority

in its bank accounts, see S.C. Code Ann. Sec. 54-3-1020 (Law. Co-op. 1977), or funds bon-owed by the Ports Authority under the authority of Sec. 54-3-1010. This reasoning finds support in the Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F.2d 628, 631-32 (2d Cir. 1989) (absent statutory provisions committing the treasuries of New York or New Jersey to satisfy judgments against the Authority, a judgment could not lead to a depletion of state treasuries), aff'd on other grounds, 495 U.S. 299 (1990) (assuming arguendo that Port Authority is a common agency of New York and New Jersey, it has waived its Eleventh Amendment immunity).

We find persuasive, however, the reasoning of the Third Circuit which, in

considering the identical New York/New Jersey Port Authority, held that the symbiotic relationship between the states and the Port Authority Trans-Hudson Corporation supported a finding of Eleventh Amendment immunity. Port Authority Police Benevolent Ass'n v. Port Authority of New York and New Jersey, 819 F.2d 413 (3d Cir.), cert. denied, 484 U.S. 953 (1987). The Third Circuit found that restrictions on the use of excess revenues to purposes within the Port Authority's statutory mandate were consistent with its holding that the Authority was to be considered an arm of the states of New York and New Jersey. Id. The court also noted, "[T]he states provided the Authority with financial support initially, and then devised a system whereby it could become finan-

cially independent. Appellant sets much store by the financial autonomy of the Authority, arguing that the Authority [therefore] is not a state agency. The appellant is mistaken." Id. at 416. To the contrary, New York's and New Jersey's creation of the Authority's financial structure supported a finding that it shares the states' immunity from suit Id.

We favor this broader and, we think, more practical approach of the Third Circuit over that of the Second Circuit in Feeney, and conclude that the first factor of the Ram Ditta test strongly supports recognition of Eleventh Amendment immunity. Although the South Carolina State Ports Authority now appears to be self-sufficient, it was created through the use of state funds and re-

received annual appropriations from the General Assembly throughout the early years of its existence. Its control over its revenues and borrowing power are substantially circumscribed. True, Sec. 54-3-1020 empowers the Authority to establish bank accounts in which to deposit its funds, but that same section provides that the state is entitled to "any and all net revenues not necessary or desirable for the operation of the business .... " Section 54-3-1010 gives the Ports Authority the ability to issue bonds; however, such borrowing is to be used only for "the acquisition, construction, equipment, maintenance and operation of any facility, building, structure, terminal railroad or any other thing which the Authority is herein authorized to acquire, construct, equip,

maintain or operate ...." Finally, as shown by the BMW transaction, the state has used the treasury of the Ports Authority as a conduit to accomplish the aims of the government of South Carolina.

B

The second inquiry required by Ram Ditta is whether the entity "exercises a significant degree of autonomy from the state." Id., 822 F.2d at 457-58. In Ram Ditta, the court found that the Parks Commission enjoyed considerable autonomy because it was a "body corporate," could sue and be sued in its corporate capacity, could enter into contracts and leases, was managed by a ten-member commission whose members were appointed by county governments, was represented in the proceedings by county attorneys as

opposed to the Maryland Attorney General's office, and derived its operating revenues from county sources. Id. at 458-59.

The Ristows assert that the existence of many of these same factors in this case requires a finding that the Ports Authority is autonomous from the State of South Carolina. It possesses the powers of a body corporate, including the power to sue and be sued and to make contracts. S.C. Code Ann. Sec. 54-3-140(1) (Law. Co-op. 1977). It can purchase and rent real and personal property and may pay all costs and expenses incident to its formation and organization. S.C. Code Ann. Sec. 54-3-140(2), -140(8) (Law. Co-op. 1977). Rather than participate in South Carolina's civil service system, the Ports Authority may

"appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation" of those employees. S.C. Code Ann. Sec. 54-3-140(5) (Law. Co-op. 1977). The Ports Authority is represented in this case by a private law firm, not South Carolina's Attorney General's office.

The Ports Authority responds, however, that it was created as an instrumentality of the State of South Carolina, S.C. Code Ann. Sec. 54-3-130 (Law. Co-op. 1977), and is governed by a seven-member board, "appointed by the Governor, with the advice and consent of the Senate . . . ." S.C. Code Ann. Sec. 54-3-10, -20 (Law. Co-op. 1977). Although it has the powers of a body corporate, the Ports Authority is unlike a traditi-

onal corporation. It has no corporate charter or shareholders, and its board of directors is appointed by public officials. Property of the Ports Authority is not subject to any state taxes or assessments. S.C. Code Ann. Sec. 54-3-1050 (Law. Co-op. 1977). Its employees are eligible for the state's employee retirement system and are subject to the state's workers' compensation plan. The Ports Authority also points out that although its general counsel's law firm was retained by its insurer to represent it in this dispute, there is an assistant State Attorney General assigned to the Ports Authority.

The power to enter into contracts, purchase property, and make unconstrained personnel decisions undoubtedly provides the Ports Authority with con-

siderable control over its day-to-day operations. Such independence, however, does not mean that the Ports Authority is not ultimately beholden to the State of South Carolina. The Ports Authority's board of directors is appointed by the governor with confirmation by the Senate; state law provides it with immunity from property taxes; it was created to serve public ends by the state's General Assembly; and the state enjoys the power to withdraw excess Ports Authority funds for its own use. Although the considerations are certainly mixed, the balance of these factors leads to the conclusion that the Ports Authority ultimately answers to the state and is not, for Eleventh Amendment purposes, an autonomous institution.

C

Likewise, the third Ram Ditta factor supports a finding of Eleventh Amendment immunity from suit. Contrary to the Ristows' position, we have little trouble in concluding that the Ports Authority's functions extend beyond the localized area of the coast to affect all regions of the state. Pursuant to authority granted it under Sec. 54-3-110,[4] the Ports Authority provides facilities to enable overland transportation of products to and from South Carolina's ports. It has such facilities in Charleston, Georgetown, Beaufort, and Spartanburg counties. The BMW transaction in Spartanburg County is additional evidence that the Ports Authority's impact can be felt in portions of the

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[4] S.C. Code Ann. Sec. 54-3-110 (Law. Co-op. 1977).

state away from the Atlantic Coast.

D

As to the final prong of the Ram Ditta test, there appears to be no clear statement of South Carolina law on this issue. It is true that the Supreme Court of South Carolina in South Carolina Farm Bureau Marketing Ass'n v. South Carolina State Ports Authority, 293 S.E.2d 854 (1982), broadly treated the actions of the Ports Authority as those of the state; however, that court's unstated assumptions cannot be accepted as a definitive statement of whether South Carolina courts view the Ports Authority as the alter ego of the state. On the other hand, the Ristows are unable to point to any state case that would show that the Ports Authority is not to be considered an arm of the state. The

state's view of the status of the Ports Authority is at best inconclusive.

E

Two additional factors influence our decision. First, the federal district courts located in South Carolina have unanimously held that the Ports Authority is entitled to Eleventh Amendment immunity. See, Coakley, No. 2:87-1442-2 (D.S.C. July 18, 1988); South Carolina State Ports Authority v. Seaboard Air Line R. Co., 124 F. Supp. 533 (E.D.S.C. 1954). Second, although the Eleventh Amendment insulates the Ports Authority from suit in federal court, under the South Carolina Tort Claim Act, an agency of the state is liable in tort in the same manner and to the same extent as a private individual under like circumstances, S.C. Code Ann. Sec. 15-78-40

(Law. Co-op. Supp. 1993), and Sec. 15-78-30 [5] defines "agency" to include any "authority" of the state. Thus, while retaining Eleventh Amendment immunity, South Carolina has provided a forum in its state courts for claims such as the Ristows'.

We conclude that the South Carolina State Ports Authority is the alter ego of the State of South Carolina and is therefore entitled to Eleventh Amendment immunity from suit.[6]

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[5] S.C. Code Ann. Sec. 15-78-30 (Law. Co-op. Supp. 1993).

[6] We therefore need not address the Ristows' argument that the district court had jurisdiction over this case based on diversity of citizenship. "Since neither a state nor its alter ego is a citizen for purposes of diversity jurisdiction, a suit between a state, or its alter ego, and a citizen of another state is not a suit between citizens of different states and diversity jurisdiction does not exist" Harris v. Pennsylvania Turnpike Comm'n. 410 F.2d 1333-34 n.1 (3d Cir. 1969).

II

Alternatively, the Ristows ask us to remand their case to the district court for a determination of whether they have alleged claims founded on admiralty law and whether the Ports Authority has waived its sovereign immunity by entering into this federally regulated area. In Parden v. Terminal R. of Alabama State Docks Dept., 377 U.S. 184, 190 (1964), overruled by, Welch v. Texas Dept. of Highways & Public Transp., 483 U.S. 468 (1987), the Supreme Court would seem to have allowed an action against a state or the alter ego of a state based on the state's adoption and ratification of the Commerce Clause. In Welch, however, the Supreme Court held that "to the extent that Parden v. Terminal Railway is inconsistent with the requirement

that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." Welch, 483 U.S. at 478. In footnote 8 of Welch, the Supreme Court went on to state that it had "no occasion to discuss the validity of the additional holding in Parden, that Congress has the power to abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that States are engaged in interstate commerce." Id. at 478 n.8 (emphasis added).

The Ristows assert that Congress does indeed possess the power to abrogate Eleventh Amendment immunity and has done so in the context of admiralty law. The Supreme Court in Welch, however, explicitly stated that "the Court has held

that the Eleventh Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity."' Id. at 472-73. The Court went on to note: "In Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), eight Members of the Court agreed that the Eleventh Amendment bars suit in admiralty brought to recover damages from the State or its officials." Id. at 473 n.3 (citations omitted). Accordingly, we conclude that a suit for money damages by the Ristows against the Ports Authority grounded in admiralty is likewise barred by the Eleventh Amendment.

III

The decision of the magistrate judge is therefore affirmed.

AFFIRMED

AMENDMENT [XI.]

Suits against states

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CHAPTER 3

(Note: Histories and citations omitted)

South Carolina State Ports Authority

	Beginning Section
ARTICLE 1. Creation and Organization.....	54-3-10
ARTICLE 3. Purposes and Powers Generally.....	54-3-110
ARTICLE 5. Supervision of Wharves, Warehouses and Other Facilities.....	54-3-410
ARTICLE 7. Erection, Repairs and Removal of Wharves, Docks and Other Structures.....	54-3-610
ARTICLE 9. Particular Powers as to Harbor and Bay of Charleston....	54-3-810
ARTICLE 11. Financial Matters.	54-3-1010

ARTICLE I

CREATION AND ORGANIZATION

SEC.

54-3-10. Creation and membership of State Ports Authority.

54-3-20. Appointment and terms of members; vacancies.

54-3-30. Organization; officers; meetings.
54-3-40. Treasurer.

Sec. 54-3-10. Creation and membership of State Ports Authority.

The South Carolina State Ports Authority is hereby created consisting of a governing body of nine members, hereafter referred to as the Authority.

Sec. 54-3-20. Appointment and terms of members; vacancies.

The members of the board shall be appointed by the Governor, with the advice and consent of the Senate, for terms of seven years each and until their successors shall have been appointed and have qualified. In the event of a vacancy, however caused, a successor shall be appointed in the manner of original appointment for the unexpired term.

Sec. 54-3-30. Organization; officers; meetings.

They shall elect one of their number

as chairman and one as vice-chairman and shall also elect a secretary. The board shall meet upon the call of its chairman and a majority of its members shall constitute a quorum for the transaction of its business.

54-3-40. Treasurer.

The Authority shall select one of its members to serve as its treasurer. The Authority shall require a surety bond of such appointee in such amount as the Authority may fix and the premium thereon shall be paid by the Authority as a necessary expense of the Authority.

ARTICLE 3

PURPOSES AND POWERS GENERALLY

SEC.

54-3-110. State may improve harbors and seaports through Authority.
54-3-120. Jurisdiction of Authority.
54-3-130. Purposes of Authority.
54-3-140. Powers of Authority.
54-3-150. Acquisition of property.

54-3-160. Powers with respect to certain property.
54-3-170. Use of certain State Property.
54-3-180. Exchange of property; removal of structures.
54-3-190. Lease or grant of property to United States; reimbursing United States for certain acquisition costs.
54-3-200. Acquisition and operation of terminal railroads.
54-3-210. Contracts with railroad employees,
54-3-220. Connecting with or crossing other railroads.
54-3-230. Foreign-trade zones.
54-3-240. Inland ports.
54-3-245. Seafood industrial port in Beaufort County.
54-3-250. Inspection of motor vehicles prior to exportation.

Sec. 54-3-110. State may improve harbors and seaports through Authority.

Through the Authority the State may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors or seaports within the State, namely Charleston, Georgetown and Port Royal, and works of internal improvement incident thereto, including the acquisition or construction, main-

tenance and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

Sec. 54-3-120. Jurisdiction of Authority.

The jurisdiction of the Authority in any of said harbors or seaports within the State shall extend over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flow and shall extend to the edge of the outer bar at such harbors or seaports.

54-3-130. Purposes of Authority.

The Authority is created as an in-

strumentality of the State for the accomplishment of the following general purposes, all or any of them, which are intended to broaden and not to restrict any other powers given to it in this chapter, namely:

(1) To develop and improve the harbors or seaports of Charleston, Georgetown and Port Royal for the handling of water-borne commerce from and to any part of the State and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve such harbors or seaports and their port facilities;

(3) To foster and stimulate the shipment of freight and commerce through such ports, whether

originating within or without the State, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To cooperate with the United States of America, and any agency or any department, corporation or instrumentality thereof in the maintenance, development, improvement and use of such harbors and seaports in connection with and in furtherance of the war operations and needs of the United States;

(5) To accept funds from any of the counties of Beaufort, Charleston or Georgetown, and to use them in such manner, within the pur-

poses of the Authority, as shall be stipulated by the county and to act as agent or instrumentality for any of such counties in any matter coming within the general purposes of the Authority;

(6) To act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(7) To cooperate and act as co-assurer with the city of Augusta, Georgia, and the Georgia State Ports Authority in furtherance of the river development project known as the Savannah River

Project Below Augusta;

(8) To promote, develop, construct, equip, maintain and operate a harbor or harbors within this State on the Savannah River, and in furtherance thereof have all of the powers, purposes and authority given by law to the Authority in reference to the harbors and seaports of Charleston, Georgetown and Port Royal; and

(9) In general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports.

Sec. 54-3-140. Powers of Authority.

In order to enable it to carry out the purposes of this chapter, the Authority:

(1) Shall have the powers of a body corporate, including the power to sue and be sued, to make contracts and to adopt and use a common seal and alter it as may be deemed expedient;

(2) May rent, lease, buy, own, acquire, mortgage and dispose of such property, real or personal, as the Authority may deem proper to carry out the purposes and provisions of this chapter, all or any of them;

(3) May acquire, construct, maintain, equip and operate wharves, docks, ships, piers, quays, elevators, compresses, refrigera-

tion storage plants, warehouses and other structures and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto and the construction of belt line roads and highways and bridges and causeways thereon and other bridges and causeways necessary or useful in connection therewith and shipyards, shipping facilities and transportation facilities incident thereto and useful or convenient for the use thereof, including terminal railroads;

(4) May acquire, construct, maintain, operate and contract to operate in any of said counties

airports, seaplane bases, naval bases and any other facilities necessary or useful in carrying out the purposes of this chapter and of the Authority;

(5) Shall appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation thereof;

(6) Shall establish an office for the transaction of its business in the city of Charleston and such other offices within and without the State as may be deemed by the board to be necessary or useful in carrying out the purposes of this chapter;

(7) May create and operate such

agencies and departments as the board may deem necessary or useful for the furtherance of any of the purposes of this chapter;

(8) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Authority and incident to the administration and operation thereof and all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this chapter;

(9) May apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the

directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof;

(10) May act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any

matter coming within the purposes or powers of the Authority;

(11) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the powers granted to it may be enjoyed and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(12) May do any and all other acts and things in this chapter authorized or required to be done, whether or not included in the general powers in this section

mentioned;

(13) May do any and all things necessary to accomplish the purposes of this chapter; and

(14) May promulgate rules and regulations governing the use of or doing business on the Authority's property or facilities, including the adoption of safety standards and insurance coverage or proof of financial responsibility, and may provide for the licensing of persons, firms or corporations using or doing business on such property or facilities, and for license fees to cover the expense thereof. Licenses may be revoked after notice and hearing by the Authority for willful breach of or

failure to comply with such rules and regulations.

But the Authority shall not engage in shipbuilding except upon the unanimous vote of its members.

Sec. 54-3-150. Acquisition of property.

For the acquiring of rights-of-way and property necessary for the construction of terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses, and other riparian and littoral terminals and structures and approaches to them and transportation facilities needful for their convenient use and belt line roads and highways, causeways, and bridges and other bridges and causeways, and for the acquiring of

property necessary for the river development project known as the Savannah River Project Below Augusta, and for the acquiring of property necessary for the development of a harbor or harbors within this State on the Savannah River, the Authority may purchase them by negotiation or may condemn them. The power of eminent domain shall apply not only to all property of private persons or corporations but also as to property already devoted to public use.

Sec. 54-3-160. Powers with respect to certain property.

The Authority may exercise in reference to any property, assets, holdings, leases, contracts, rights, franchises or licenses conveyed to it under Section 1 of Act No. 216 of 1945 (Acts 1945, p 365) all of the rights, privileges, pow-

ers, immunities, duties and functions conferred by Secs. 54-5-10, 54-5-60, 54-5-80, 54-5-90 and Secs. 5-35-10 to 5-35-40 upon cities of this State having a population of fifty thousand inhabitants or more and upon port utilities commissions of such cities.

Sec. 54-3-170. Use of certain State property.

The Authority may take, exclusively occupy, use and possess, in so far as may be necessary for carrying out the provisions of this chapter, any areas of land owned by the State and within the counties of Beaufort, Charleston and Georgetown, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the ripar-

ian rights thereto pertaining. When so taken and occupied, due notice of such taking and occupancy having been filed with the Secretary of State, such areas of land are hereby granted to and shall be the property of the Authority. For the purposes of this section, the meaning of the term "use" shall include the removal of material from and the placing of material on any such land. In case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provisions of this section shall continue in full force and effect as to all other lands owned by the State. The provisions of this section are subject to all laws and regulations of the United States with respect to navigable waters.

Sec. 54-3-180. Exchange of property; removal of structures.

The Authority may exchange any property acquired under the authority of this chapter for other property usable in carrying out the powers hereby conferred and also may remove from lands needed for its purposes and reconstruction on other locations, buildings, terminals, railroads or other structures upon the payment of just compensation, if, in its judgment, it is necessary or expedient so to do in order to carry out any of its plans for port development, under the authorization of this chapter.

Sec. 54-3-190. Lease or grant of property to United States; reimbursing United States for certain acquisition costs.

The board of the Authority may assign, transfer, lease, convey, grant or donate to the United States of America, or to the appropriate agency or department

thereof, any or all of the property of the Authority for any use by such grantee for any purpose included within the general purposes of this chapter, as stated in Sec. 54-3-130, such assignment, transfer, lease, conveyance, grant or donation to be upon such terms as the board of the Authority may deem advisable. In the event the United States of America should decide to undertake the acquisition, construction, equipment, maintenance or operation of the airports, seaplane bases, naval bases, wharves, piers, ships, refrigerator storage plants, warehouses, elevators, compresses, docks, shipyards, shipping and transportation facilities before referred to, including terminal railroads, roads, highways, causeways or bridges, and should itself decide to acquire the

lands and properties necessarily needed in connection therewith by condemnation or otherwise, the board of the Authority may transfer and pay over to the United States of America, or to the appropriate agency or department thereof, such of the moneys belonging to the Authority as may be found needed or reasonably required by the United States of America to meet and pay the amount of judgments or condemnation, including costs, if any be taxed thereon, as may from time to time be rendered against the United States of America, or its appropriate agency, or as may be reasonably necessary to permit and allow the United States of America, or its appropriate agency, to acquire and become possessed of such lands and properties as are reasonably required for the construction

and use of the facilities before referred to.

Sec. 54-3-200. Acquisition and operation of terminal railroads.

The Authority may acquire, own, lease, locate, install, construct, equip, hold, maintain, control and operate at harbors and seaports a line of terminal railroads with necessary sidings, turnouts, spurs, branches, switches, yard tracks, bridges, trestles and causeways and in connection therewith or appurtenant thereto may further lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyance or appliance necessary or proper to carry passengers, goods, wares and merchandise over, along or upon the tracks of such railroads or other conveyances.

Sec. 54-3-210. Contracts with railroad employees.

The Authority may make agreements as to the scale of wages, seniority,and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the operation of the terminal railroads provided for in Sec. 54-3-200 and the service and equipment pertinent thereto. And should the Authority exercise the power herein given then the Authority shall make such agreements with such employees in accordance with the act of Congress known as the Railway Labor Act (USC Title 45, Secs. 151-163) as amended or as hereafter amended to the end that such agreements as to seniority and working conditions will obtain as to such employees and the standard rate of pay be provided as is in

force relative to like employees of interstat railroads operating in the same territory with the terminal railroads authorized hereby.

Sec. 54-3-220. Connecting with or crossing other railroads.

The Authority may with its terminal railroads connect with or cross any other railroad upon the payment of just compensation and receive, deliver to and transport the freight, passengers and cars of common carrier railroads as though it were an ordinary common carrier.

Sec. 54-3-230. Foreign-trade zones.

The South Carolina State Ports Authority is authorized to make application to the Foreign-Trade Zones Board for the purpose of establishing, operating, and maintaining foreign-trade zones in the

State, under the act of Congress known as the Foreign-Trade Zones Act which provides for the establishment, operation and maintenance of foreign-trade zones in the United States.

The South Carolina State Ports Authority shall select and describe the location of the zones for which application may be made and shall make such rules and regulations concerning the operation, maintenance and policing of them as may be necessary to insure compliance with the Foreign-Trade Zones Act and for other appropriate purposes.

The South Carolina State Ports Authority shall have full power and authority to erect, maintain and operate or lease any structures or buildings or enclosures as may be necessary or proper for the establishing, operating, and main-

taining of any such foreign-trade zones in the State of South Carolina.

The authority granted to The South Carolina State Ports Authority confers the right and duty and power to do all things necessary and proper to achieve compliance with the Foreign-Trade Zone Act and to carry into effect establishing, operating and maintaining of foreign-trade zones within the State.

Sec. 54-3-240. Inland ports.

The South Carolina State Ports Authority is authorized to establish inland ports to provide services for the handling of general merchandise cargo; provided, however, that no such inland port shall be established unless it is designated as a United States Port of Entry by the United States Custom Service. The State Ports Authority shall select and

describe the location of any such inland port and may erect, maintain and operate or lease any structure, building or enclosure as may be necessary for the establishment, operation and maintenance of any such port. The Authority shall make such rules and regulations and do such other things as may be necessary to carry out the purposes of this section.

Sec. 54-3-245. Seafood industrial port in Beaufort County.

In addition to the powers granted previously to the State Ports Authority, the Authority may construct, equip and operate a seafood-industrial port in Beaufort County or it may contract with any agency or political subdivision of the State of South Carolina for any or all of these purposes.

Sec. 54-3-250. Inspection of motor vehicles prior to exportation.

No motor vehicle shall be exported to another country through the State Ports, Authority unless the Authority has inspected the vehicle and determines that it is the same vehicle described on the documents required to be filed concerning the exportation of such vehicle.

ARTICLE 5

SUPERVISION OF WHARVES, WAREHOUSES AND OTHER FACILITIES

SEC.

54-3-410. Authority shall have general supervision of wharves, warehouses and terminal facilities.
54-3-420. Examination of facilities.
54-3-430. Requiring repair or improvement of facilities.
54-3-440. Authority may order improvements to facilities on petition.
54-3-450. Unsafe or unsuitable facilities.
54-3-460. Penalties for violations of rules and regulations.
54-3-470. Appeals.
54-3-480. Article inapplicable to portions of Charleston County.

Sec. 54-3-410. Authority shall have general supervision of wharves, warehouses and terminal facilities.

The Authority shall have general supervision in the port of Charleston of all wharves, warehouses and terminal facilities of all transmitting and transporting corporations and of all wharves, warehouses and. terminal facilities of persons engaged in business as public warehousemen or wharfingers and shall examine them and keep itself informed as to their condition and the manner in which they are operated, with reference to the security and accommodation of the public and the compliance with all provisions of law applicable thereto.

Sec. 54-3-420. Examination of facilities.

The Authority may examine into all wharves, warehouses and terminal facilities, and the approaches thereto in

Charleston County.

Sec. 54-3-430. Requiring repair or improvement of facilities.

Whenever in the judgment of the Authority it shall appear that repairs are necessary upon any such wharves, warehouses or terminal facilities or that any additions, improvements or enlargements in such wharves, warehouses or terminal facilities or any change in the mode of operating and constructing such business is reasonable and expedient in order to promote the security, convenience and accommodation of the public or to provide facilities required by the business offering at the port of Charleston, the Authority shall give information in writing to the owners or operators of such wharves, warehouses and terminal facilities of the improve-

ments, changes, enlargements and betterments which it judges to be proper and if the owners or operators of such wharves, warehouses and terminal facilities shall fail within sixty days to adopt the suggestion of the Authority, the Authority shall take such legal proceedings as it may deem expedient.

Sec. 54-3-440. Authority may order improvements to facilities on petition.

Upon the written petition of the city council of Charleston or of any of the patrons of any person owning or operating a wharf, warehouse or terminal facility for public uses or for hire, alleging that the plant or equipment in Charleston County of such person is inadequate or unsuited to the public need, the Authority shall fix a time and place for a hearing upon such petition and shall mail notice thereof to the parties

in interest and give due public notice thereof at least one week prior to such hearing. Upon such hearing the Authority may, if it finds the wharf, warehouse or terminal facility to be inadequate or unsuited to the public need, order and prescribe such wharf, warehouse or terminal facility as shall be adequate and suitable and fix a time within which such person owning or operating the same shall construct such additions or improvements. Such person shall thereupon construct such additions or improvements to its plant or equipment within the time so fixed.

Sec. 54-3-450. Unsafe or unsuitable facilities.

The owners or occupiers of any wharf, warehouse or terminal facility within Charleston County shall at all times, as

long as such is used for public purposes, keep it and the sheds thereon and the approaches thereto in proper condition and repair. If such wharf, warehouse, terminal facility, superstructures or the approaches thereto are dangerous to life or limb or unsafe or unsuitable for the persons using them, the Authority shall notify in writing the owner or occupier of such wharf, warehouse or terminal facility to put it in proper repair or condition. If the owner or occupier shall neglect or refuse to put such wharf, warehouse, terminal facility, superstructures or approaches in proper condition within thirty days after notice, such owner or occupier so offending shall be subject to a penalty of one hundred dollars and the further sum of ten dollars for each day such ne-

glect shall continue and shall moreover pay all expense incurred by reason of such neglect or refusal. And if such wharf, warehouse or terminal facility be at such time used for public purposes, the Authority may repair and put it in safe and suitable condition at the expense of the owner or occupier. But the owner or occupier of any such property shall, within ten days after notice is served upon him to repair the same, have the right to apply to the Authority for a hearing.

Sec. 54-3-460. Penalties for violations of rules and regulations.

If any person having a wharf, warehouse or terminal facility used for public purposes in Charleston County shall be guilty of a violation of the rules and regulations provided and prescribed by the Authority, such person owning or

operating such wharf, warehouse or terminal facility shall incur a penalty for each offense of not less than one hundred dollars nor more than three hundred dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall be in any court of competent jurisdiction in the State where such violation has occurred or wrong has been perpetrated.

Sec. 54-3-470. Appeals.

Any such person may appeal from any order, ruling or requirement of the Authority under this article to the court of common pleas for Charleston County, to be heard and determined by the presiding judge thereof as if tried de novo before him. The judge shall pass upon and determine the reasonableness of such order, ruling or requirement and such

appeal shall stay the execution of any order, ruling or requirement appealed from. No fines or penalties imposed by the Authority shall be operative or commence to run until the final determination of such appeal.

Sec. 54-3-480. Article inapplicable to portions of Charleston County.

The provisions of this article shall not apply to any portion of Charleston County not included in the city of Charleston or in the portion of the county lying to the north of said city and between the Ashley and Cooper Rivers.

ARTICLE 7

ERECTION, REPAIRS AND REMOVAL OF WHARVES, DOCKS AND OTHER STRUCTURES

SEC.

54-3-610. Powers of Authority as to erection or removal of wharves, docks, and other structures.

54-3-620. Permit for construction of wharf or other obstruction.
54-3-630. Penalty for building wharves or other obstructions beyond limits without authority.
54-3-640. Duties of Authority as to repair of docks; owners liable for neglect.
54-3-650. Authority shall prosecute for fines and penalties.

Sec. 54-3-610. Powers of Authority as to erection or removal of wharves, docks and other structures.

The Authority may fix the lines along the bay and harbor of Charleston and the rivers and creeks flowing therein within which riparian owners may erect wharves, docks and other proper erections and fixtures for commercial, manufacturing or any other purposes. The Authority may cause the removal of any wharf, dock, wreck or other structure that may obstruct navigation or that may, in its opinion, be injurious to said bay, harbor, rivers or creeks, at the expense of the owner or the person causing the ob-

structions. But the rights of any owner of a wharf whose lines have heretofore been fixed by grant or by authority of State legislation are in no wise to be disturbed.

54-3-620. Permit for construction of wharf or other obstruction.

No person shall build or extend any wharf or other obstruction in or upon the waters of the bay or harbor of Charleston or the rivers or creeks flowing therein without first obtaining, in writing, from the Authority a permit for so doing, except when the lines of such wharf have been fixed by any grant or by authority of State legislation, under a penalty of twenty dollars for every day such wharf or obstruction shall remain.

Sec. 54-3-630. Penalty for building wharves or other obstructions beyond limits without authority.

No person shall build any wharf or other obstruction beyond the lines so fixed by the Authority except when the lines of such wharf have heretofore been fixed by grant or by authority of State legislation. Any person so doing shall pay the sum of twenty dollars for every such offense and shall moreover be fined in the sum of twenty dollars for every day such wharf or other obstruction shall remain.

Sec. 54-3-640. Duties of Authority as to repair of docks; owners liable for neglect.

The Authority shall examine, or cause to be examined, all the docks, public or private, upon the waters of Charleston bay and harbor and the rivers and creeks flowing therein. When it is the opinion of the Authority that any such dock is not in a proper condition for the pur-

poses for which it was designed and used, it shall cause a notice to be served upon the owner or occupier of such dock and he shall deepen such dock and if such owner or occupier shall neglect or refuse to attend to such dock after thirty days' notice, such person so offending shall forfeit and pay twenty dollars and the further sum of five dollars for every day he shall so neglect or refuse and shall, moreover, pay all expenses incurred by reason of such neglect or refusal.

Sec. 54-3-650. Authority shall prosecute for fines and penalties.

The Authority shall prosecute for fines and penalties under Secs. 54-3-610 to 54-3-640.

ARTICLE 9

PARTICULAR POWERS AS TO HARBOR AND BAY OF CHARLESTON

SEC.

54-3-810. Jurisdiction and powers of Authority over harbor and bay of Charleston.
54-3-820. Deposit of excavated material.
54-3-830. Harbor master and port wardens.
54-3-840. Fees and harbor or port charges.
54-3-850. Payment and disbursement of fees, harbor or port charges, fines and penalties.
54-3-860. Authority shall report annually to General Assembly.

Sec. 54-3-810. Jurisdiction and powers of Authority over harbor and bay of Charleston.

The South Carolina State Ports Authority shall have jurisdiction over the harbor and bay of Charleston and the rivers and creeks flowing therein, may preserve peace and good order in said bay and harbor and shall make such regulations as it may see fit, not repugnant to the laws of the land, for the regulation and government of vessels entering said port and waters so as to provide

for their safe and convenient use thereof and for the protection and preservation of said bay, harbor, rivers and creeks from injury by means of deposit of ballast and other materials, the creation of obstructions or for any other cause whatsoever, with authority to prescribe such penalties for the violation of such regulations as it may deem adequate; provided, that such penalty shall not exceed the sum of five hundred dollars for each offense, together with the expense of removing such obstructions or interferences with navigation. The solicitor of the circuit shall enforce such penalties upon the information and at the request of the Authority.

Sec. 54-3-820. Deposit of excavated material.

When any dredging or excavation shall

be done in said bay and harbor or rivers and creeks or the docks thereon, the material excavated shall be deposited only at such place or places as may be designated by the Authority, under such penalty not exceeding the amount prescribed in Sec. 54-3-810, as the Authority shall prescribe. The Authority shall prosecute for fines and penalties under this section.

Sec. 54-3-830. Harbor master and port wardens.

The Authority may elect or appoint annually a harbor master and such number of port wardens as in its discretion is necessary for the bay and harbor of Charleston and the rivers and creeks flowing therein and may define and assign the duties of such harbor master and port wardens under the rules and

regulations for the government of vessels within or entering into said harbor and waters, or any of them, and for their safe and convenient use of said waters and may regulate their compensation, with power to remove them, or any of them, at its discretion.

Sec. 54-3-840. Fees and harbor or port charges.

The Authority may levy and collect from all vessels entering into and using the port of Charleston such fees and harbor or port charges, not inconsistent with the law, as in its discretion, may be necessary to pay the harbor master and port wardens for the services required of them and to defray the necessary expenses attendant upon the execution of the duties devolved upon it under this article in relation to the regulations for the safety and convenience

of vessels entering said port and waters, or any of them.

Sec. 54-3-850. Payment and disbursement of fees, harbor or port charges, fines and penalties.

All fees, harbor or port charges, fines and penalties collected under the provisions of this article shall be paid over to the Authority and be disbursed by it in paying the salaries of the harbor master and port wardens and such other officers as it may see fit to appoint to facilitate the discharge of the duties imposed by this article and such other expenses as may be incident to such duties. At the end of each fiscal year it shall keep on hand the sum of five thousand dollars as an operating fund, and shall turn over all funds in excess of five thousand dollars to the State port construction fund.

Sec. 54-3-860. Authority shall report annually to General Assembly.

The Authority shall annually report to the General Assembly the amounts received for fees, harbor or port charges, fines and penalties and the disbursement thereof and also generally its acts and doings under this article.

ARTICLE 11

FINANCIAL MATTERS

SEC.
54-3-1010. Issuance of bonds.
54-3-1020. Disbursement of funds; surplus.
54-3-1030. State port construction fund.
54-3-1040. Annual financial statement.
54-3-1050. Property of Authority exempt from taxation.

Sec. 54-3-1010. Issuance of bonds.

As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building structure, terminal railroad or any oth-

er matter or thing which the Authority is herein authorized to acquire, construct, equip, maintain or operate, all or any of them, the Authority may issue bonds, payable both as to principal and interest from the revenues to be derived from the operation of all or any part of its properties and facilities, and the powers and authority granted to counties, cities, school districts and other political subdivisions of the State are hereby extended to and made available to the Authority. All revenue bonds issued by the Authority to obtain funds for the acquisition, construction, equipment, maintenance and operation or its properties and facilities shall be issued in accordance with the provisions of Secs. 6-21-10 to 6-21-570 and all conditions, restrictions and limitations imposed by

said Secs. 6-21-10 to 6-21-570 as amended, shall be observed by the Authority in the issuance of such bonds, except as follows:

(1) A pledge of the net revenues derived from the operation of its properties and facilities, all or any of them, rather than its gross revenues, may be made; and

(2) Free service may, in the discretion of the Authority, be afforded to the United States of America, or any agency, department, corporation or instrumentality thereof, by any property or facility of the Authority to acquire, construct, equip, maintain and operate which funds were obtained from the revenue bonds purchased and held by a

Federal agency, provided such free service is with the consent and at the request of the Federal agency then holding the whole of such revenue bonds.

Sec. 54-3-1020. Disbursement of funds; surplus.

All funds of the Authority shall be deposited in a bank or banks to be designated by the Authority. Funds of the Authority shall be paid out only upon warrants signed by the treasurer of the Authority and countersigned by the chairman or the acting chairman. No warrants shall be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this chapter and only when the account or expenditure for which they are to be given in payment has been audited and approved

by the Authority. Any and all net revenues or earnings not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly.

Sec. 54-3-1030. State port construction fund.

The Authority may accept contributions from all persons for the construction and equipping of port facilities and improvements in the ports of the State, and shall place all such contributions in a separate fund to be known as "the State port construction fund," and shall use such fund only for the purpose of engineering, constructing and equipping new port facilities and improving and enlarging existing port facilities.

Sec. 54-3-1040. Annual financial statement.

At least once in each year the Author-

ity shall publish once in some newspaper, published in Charleston County a complete detailed, statement of all moneys received and disbursed by the Authority during the preceding year. Such statement shall also show the several sources from which such funds were received and the balance on hand at the time of publishing the statement and shall show the complete financial condition of the Authority.

Sec. 54-3-1050. Property of Authority exempt from taxation.

The property of the Authority shall not be subject to any taxes or assessments thereon.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and
SUSAN M. RISTOW, his wife,

Plaintiffs,

COMPLAINT AND JURY DEMAND

-vs-

Case No. 2:91-3677-2

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and THE SS UNKNOWN, an unknown ocean going ship,

Defendants.

NOW COMES the plaintiffs, Fred W. Ristow and Susan M. Ristow, pro se, and as and for their Complaint and claims for relief against the above-named defendants state as follows:

Jurisdiction

1. Federal jurisdiction is based on diversity of citizenship, 28 U.S.C. SS1332(a), in that this is a civil ac-

tion in which the plaintiffs are citizens of the State of Wisconsin, the defendant, South Carolina State Port Authority, is an agency of the State of South Carolina, and the defendant, The SS Unknown, is an unknown ocean going ship whose country of registry is unknown and whose home port or principal place of business is unknown but, upon information and belief, is not within the State of Wisconsin.

The matter in controversy exceeds the sum of $50,000.00, exclusive of interest and costs.

2. Federal jurisdiction is also based on admiralty 28 U.S.C. SS1333, in that this is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears.

Venue

3. This is a civil action where federal jurisdiction is founded on both diversity of citizenship and admiralty. The acts, events, and omissions giving rise to the injuries and claims herein occurred within District of South Carolina, Charleston Division. Venue in the United States District Court for the District of South Carolina, Charleston Division, is therefore proper, pursuant to 28 U.S.C. SS 1391 (b)

The Named Plaintiffs

4. Fred W. Ristow is an adult individual and a citizen of the United States and the State of Wisconsin who resides at W227 S8915 St. Joseph's Drive in the Village of Big Bend, County of Waukesha, and State of Wisconsin. The occupation of the said Fred W. Ristow is that of a truck driver.

5. Susan M. Ristow is an adult individual and a citizen of the United States and the State of Wisconsin who resides at W227 S8915 St. Joseph's Drive in the Village of Big Bend, County of Waukesha, and The State of Wisconsin. The occupation of the said Susan M. Ristow is that of a housewife. The said Susan M. Ristow is the wife of the plaintiff, Fred W. Ristow, and was the wife of the said Fred W. Ristow on December 20, 1988 and at all other times material to this Complaint.

Defendants

6. The defendant, South Carolina State Ports Authority, is upon information and belief, an agency of the State of South Carolina organized and existing under and by virtue of the laws of the State of South Carolina. The said South

Carolina State Ports Authority is, upon information and belief, engaged in the business of managing the ports and harbors lying within the State of South Carolina and overseeing and managing on behalf of the State of South Carolina all operations with respect to such ports and harbors. That, upon information and belief, the principal place of business of the defendant, South Carolina State Ports Authority, is located in the City of Charleston, County of Charleston, State of South Carolina, and said defendant has a mailing address of Post Office Box 817, Charleston, South Carolina 29402.

7. The defendant, The SS Unknown, is an ocean going ship whose identity, registry, home port, and principal place of business are unknown. That despite due

and diligent inquiry of the defendant, South Carolina State Ports Authority, by the plaintiffs, the plaintiffs were unable to obtain any information with respect to the identity, registry, home port, and principal place of business of the defendant, The SS Unknown. That, upon information and belief, the defendant, The SS Unknown, was, on December 20, 1988 and at all other times material to the Complaint, engaged in the business of transporting various goods and materials to and from various locations in the world.

8. That, upon information and belief, the defendant, South Carolina State Ports Authority, was, on December 20, 1988 and at all, other times material to this Complaint, acting as an agent for and on behalf of the defendant, The SS

Unknown.

First Claim For Relief

(Claim of Fred W. Ristow Against Defendants For Ordinary Negligence)

As and for their first claim for relief, the plaintiffs allege as follows:

9. On December 20, 1988 and at all other times material to this Complaint, the plaintiff, Fred W. Ristow was employed as a long haul truck driver and longshoreman by Donald Fanetti, d/b/a Donald Fanetti Trucking, who has his principal place of business located in the City of Franklin, County of Milwaukee, and State of Wisconsin at 6701 W. Ryan Road therein. That, on December 20, 1988 and at all other times material to this Complaint, the said Donald Fanetti was engaged in the business of transporting various goods and materials by

truck to and from various locations throughout the United States and in the business of loading and unloading such goods and materials at their respective points of pick up and delivery.

10. That immediately prior to and on December 20, 1988, while in the course of his employment with Donald Fanetti, the plaintiff, Fred W. Ristow, transported by semi-truck and flat bed trailer a load of steel pipe from the State of Wisconsin to a location within the City of Charleston, County of Charleston, State of South Carolina immediately adjacent to the Atlantic Ocean,, which location upon information and belief, was owned, operated, and managed by the defendant, South Carolina State Authority, and is hereinafter referred to as the "terminal."

11. That upon arriving at the terminal on December 20, 1988, the plaintiff, Fred W. Ristow drove the truck he was operating onto the terminal premises and to a location on said premises at which his cargo of pipe was to be unloaded by employees of the defendant, South Carolina State Ports Authority, and himself.

12. That, upon information and belief, the defendant, The SS Unknown, was to arrive at the terminal on a later date, pick up the load of pipe the plaintiff, Fred W. Ristow, had transported to the terminal, and transport such pipe to a location within the Country of Venezuela.

13. That the pipe transported by the plaintiff, Fred W. Ristow, was organized on the flat bed trailer in the following manner: there were five bundles of pipe

laying on the trailer with each bundle containing four individual pipes.

14. That on December 20, 1988, an unknown employee of the defendant, South Carolina State Ports Authority, was assigned by the said South Carolina State Ports Authority to operate a fork lift truck to unload the pipe from the truck operated by the plaintiff, Fred W. Ristow. The said unknown employee assigned to operate the fork lift on that occasion is hereinafter referred to as the "fork lift driver."

15. That on December 20, 1988, while the plaintiff Fred W. Ristow, was standing on top of a load of pipe on the trailer and assisting in the unloading process, the fork lift driver, with said plaintiff in plain view, negligently picked up the entire load of five bun-

dles of pipe with the fork lift, lost control of said load while traveling in the direction of said plaintiff, and dropped one bundle of pipe thus presenting said plaintiff with an emergency and causing him to jump from truck to avoid fatal injury. That as he jumped, plaintiff was struck in the lower left leg, left ankle, left heel, and left foot by the falling pipe. That as a result of the aforementioned incident, the plaintiff, Fred W. Ristow, sustained severe, traumatic, and disabling injuries which well be described hereafter.

16. That at said time and place, the fork lift driver was negligent in the following respects:

a. In attempting to lift too great a load of pipe with the fork lift he was operating;

b. In failing to properly manage and control both the forklift he was operating and the load of pipe he was attempting to lift;

c. In failing to maintain a proper lookout for the plaintiff, Fred W. Ristow;

d. In failing to exercise due care and caution for the safety of the plaintiff, Fred W. Ristow.

17. That all of the acts and omissions of the fork lift driver constitute the direct, efficient, and proximate cause of the injuries sustained by the plaintiff, Fred W. Ristow.

18. That the plaintiff, Fred W. Ristow, suffered severe, traumatic, and disabling injuries consisting, among other things, of a severe comminuted fracture of the left os calcis (heel)

abrasions, contusions, and discoloration to the lower left leg, left ankle, and left foot, fractures of the left foot and left ankle, destroyed left subtalar joint with significant injury to the calcaneal cuboid joint, and possible dislocations in the left lower extremity. The plaintiff, Fred W Ristow, was required to obtain medical care, comfort, and treatment and was eventually required to undergo a surgical procedure known as a left foot triple arthrodesis with iliac crest bone graft. This plaintiff was incapacitated from work for a period of one and one-half years and has had difficulties in performing the normal duties in life. This plaintiff was for a period of time unable to partake of the joys of life and social activities. This plaintiff verily believes

that the injuries to his left ankle, left heel, and left foot are permanent in nature and that he has suffered permanent, partial disability in the use of his left lower extremity. This plaintiff verily believes that his capacity to enjoy life in the future and his capacity to earn a living in the future have been impaired. This plaintiff has suffered excruciating pain, suffering, and distress in the past and verily believes he will suffer pain, suffering and distress in the future. This plaintiff has suffered economic losses in the past which have been projected in excess of $70,000.00 and verily believes he will suffer economic losses in the future which have been projected in excess of $100,000.00. This plaintiff verily believes he will be required to obtain

medical care, comfort, and treatment for his injuries in the future. As a result of these injuries, this plaintiff estimates he has sustained total damages in excess of $400,000.00.

19. That the defendant, South Carolina State Ports Authority, is vicariously liable, pursuant to the applicable law, for the negligence of its employee fork-lift driver under the doctrines of respondeat superior and agency.

20. That the defendant, The SS Unknown, is also vicariously liable, pursuant to the applicable law, for the negligence of the fork lift driver under the doctrines of respondeat superior and agency.

21. That any governmental tort claim filing requirements under the laws of South Carolina have been waived herein

because of actual notice of this incident and injury to the defendant, South Carolina State Ports Authority, and said defendant's acknowledgment of the occurrence of such incident and injury.

22. That the defendant, South Carolina State Ports Authority, is estopped from raising any governmental tort claim filing requirement and any special governmental tort claim statute of limitations under the laws of South Carolina as defenses herein because of the conduct of its insurance adjustor from Crawford and Company which is described in paragraphs 26 through 34 of this Complaint.

Second Claim For Relief

(Claim of Susan M. Ristow Against Defendants For Loss of Consortium)

23. As and for their second claim for

relief, the plaintiffs reallege all of the allegations contained in paragraph 1 through 22 of this complaint and incorporate the same by reference as though specifically set forth at length herein.

24. The plaintiff, Susan M. Ristow, is the wife of the plaintiff, Fred W. Ristow, and as such she is entitled to his companionship, society, support, health, aid, and consortium.

25. That because of the negligence of the defendants, the plaintiff, Susan M. Ristow, was deprived of companionship, society, support, health, aid, consortium, and services all to her damage in the estimated amount of $10,000.00. That the plaintiff, Susan M. Ristow, verily believes she will sustain a partial loss of these same services, support, comfort, and aid in the future all to her

damage in the estimated amount of $20,000.00.

Third Claim For Relief

(Claim of Both Plaintiffs For Breach of Contract Against South Carolina State Ports Authority)

26. As and for their third claim for relief, the plaintiffs reallege all of the allegations contained in paragraphs 1 through 25 of this Complaint and incorporate the same by reference as though specifically set forth at length herein.

27. That at some point after incident and injuries to the plaintiff, Fred W. Ristow, occurred, the defendant, South Carolina State Ports Authority, advised its insurance carrier, Lloyds of London Insurance Company, of the occurrence of said incident and injuries and an insur-

ance adjustment company, Crawford and Company, of Charleston, South Carolina was retained by the South Carolina State Ports Authority and its insurance carrier to represent said defendant and its insurance carrier with respect to the plaintiffs' claims.

28. That an employee by the name of Lee Pittillo was assigned by Crawford and Company to handle this matter. That at some point subsequent to December 20, 1988, the plaintiffs were so advised of the involvement and representation by Crawford and Company with respect to their claims.

29. That on a date in the summer of 1990, the plaintiffs had a telephone conversation with Lee Pittillo during which Lee Pittillo offered to settle the plaintiffs' claims against the defend-

ant, South Carolina State Ports Authority, for the sum of $75,000.00.

30. That, upon information and belief, Lee Pittillo was duly authorized by the defendant, South Carolina State Ports Authority, and its insurance carrier to make the above-stated settlement offer to the plaintiffs.

31. That the plaintiffs subsequently accepted this oral settlement offer and a binding oral contract for the settlement of the plaintiffs' claims accordingly existed between the parties. That the plaintiffs anticipated receiving, within a reasonable time, a check in the amount of $75,000.00 from either the defendant, South Carolina State Ports Authority, its insurance carrier, or Crawford and Company, along with an appropriate written statement agreement and

release documentations.

32. That as of this date no check or settlement documentation has been received by the plaintiffs from either the defendant, South Carolina State Ports Authority, its insurance carrier, or Crawford and Company.

33. That the defendant, South Carolina State Ports Authority, has accordingly breached its oral contract for the settlement of the plaintiffs' claims which was entered into by its duly authorized representative by failing to forward a check to the plaintiffs for the settlement amount accompanied by the appropriate settlement documentation. Such action also constitutes bad faith on the defendant's part.

34. That as a result of this breach of contract, the plaintiffs have been

damaged in the amount of $75,000.00.

WHEREFORE, the plaintiffs demand judgment against the defendants as follows:

A. For the sum of Four Hundred Thousand Dollars ($400,000.00) in favor of the plaintiff, Fred W. Ristow, against the defendants, South Carolina State Ports Authority and The SS Unknown, and each of them, with respect to the First Claim for Relief set forth in this Complaint;

B. For the sum of Thirty Thousand Dollars ($30,000.00) in favor of the plaintiff, Susan M. Ristow, against the defendants, South Carolina State Ports Authority and The SS Unknown, and each of them, with respect to the Second Claim

for Relief set forth in this Complaint;

C. For the sum of Seventy-Five Thousand Dollars (75,000.00) in favor of the plaintiffs, Fred W. Ristow and Susan M. Ristow, against the defendant, South Carolina State Ports Authority, with respect to the third Claim for Relief set forth in this Complaint;

D. For costs, disbursements, and attorney's fees of this action;

E. For such other and further relief as to the Court may seem just and equitable.

Dated at Big Bend, Wisconsin, this 7th day of December, 1991.

/s/ Fred W. Ristow
Fred W.Ristow, Plaintiff Pro Se

/s/ Susan M. Ristow
Susan M. Ristow, Plaintiff Pro Se

Plaintiffs' Address:

W227 W8915 St. Joseph's Drive
Big Bend, Wisconsin 53103

Telephone: (414) 662-2774

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Jury Demand

The plaintiffs hereby demand trial by a jury of twelve in conjunction with this action as provided by Rule 38 of the Federal Rules of Civil Procedure.

Dated at Big Bend, Wisconsin this 7th day of December, 1991.

/s/ Fred W. Ristow
Fred W. Ristow,Plaintiff Pro Se

/s/ Susan M. Ristow
Susan M. Ristow,Plaintiff Pro Se

Plaintiffs' Address:

W227 S8915 St. Joseph's Drive
Big Bend, Wisconsin 53103

Telephone: (414) 662-2774

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Verification

Fred W. Ristow, having first been duly sworn on oath, deposes and states that he is one of the Plaintiffs in this action and that he has read the foregoing Complaint, and that to the best of his knowledge, information and belief, the facts set forth therein are true and correct.

/s/ Fred W. Ristow
Fred W. Ristow

Subscribed and sworn to before me
this 7th day of December, 1991.

/s/ Leonard W. Schulz
Notary Public State of Wisconsin
My Commission: is permanent

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Verification

Susan M. Ristow, having first been duly sworn on oath, deposes and states that she is one of the Plaintiffs in this action and that she has read the foregoing Complaint, and that to the best of her knowledge, information and belief, the facts set forth therein are true and correct.

/s/ Susan M. Ristow
Susan M. Ristow

Subscribed and sworn to before me
this 7th day of December 1991.

/s/ Leonard W. Schulz
Notary Public, State of Wisconsin
My Commission: is permanent

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
Charleston Division

FRED W. RISTOW AND SUSAN M. RISTOW, his wife,

Plaintiffs,

VS.

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and The SS Unknown, an unknown ocean going ship,

Defendants.

CASE NO.: 2:91-3677-2

MOTION TO DISMISS

The Defendant South Carolina State Ports Authority moves the Court to dismiss the action on the ground that the Court lacks jurisdiction over the subject matter as follows:

1. The Defendant South Carolina State Ports Authority alleges and shows and the Plaintiff acknowledged in its Complaint that Defendant is an agency of the State of South Carolina and is completely identified with said State in

the performance of its public functions, that this action against the Defendant South Carolina State Ports Authority is really an action against the State of South Carolina by a citizen of another state, and that this Court does not have jurisdiction over the subject matter of claim against said state because of the Eleventh Amendment to the Constitution of the United States which provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

The sole relief of Plaintiffs against the Defendant is a claim under the South Carolina Tort Claims Act in the State Court.

2. The Defendant South Carolina State Ports Authority is not a citizen for purposes of diversity jurisdiction.

3. The Complaint alleges only land-side torts and actions, and therefore fails to state a claim in admiralty jurisdiction.

VAUGHAN & LAWRENCE, P.A.

By: /s/ Philip L. Lawrence
Philip L. Lawrence
23 Broad Street
Post Office Box 1559
Charleston, SC 29402
(803) 723-3020
ATTORNEYS FOR DEFENDANT SOUTH CAROLINA STATE PORTS AUTHORITY

February 3, 1992

Charleston, South Carolina

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW AND SUSAN M. RISTOW, his wife,

Plaintiffs, AFFIDAVIT

VS. Case No.: 2:91-3677-2

SOUTH CAROLINA STATE FORTS AUTHORITY, and agency of the State of South Carolina, and THE SS UNKNOWN, an unknown ocean going ship,

Defendants.

STATE OF WISCONSIN)
) SS
COUNTY OF WAUKESHA)

FRED W. RISTOW being first duly sworn oath, deposes and states as follows:

1. That affiant is one of the plaintiffs in the above-entitled action and makes this Affidavit in opposition to a Motion To Dismiss brought by the defendant, South Carolina State Ports Authori-

ty.

2. That affiant was injured on the premises of the defendant, South Carolina State Ports Authority on December 20, 1988.

3. That affiant was accompanied to the hospital by a managerial employee of the defendant, South Carolina Ports Authority. Also affiant was accompanied to the hospital on December 20, 1988 by Lee Pitillo, an Adjuster affiant believes is employed by Crawford and Company who was acting on behalf defendant, South Carolina State Ports Authority and its insurance carrier, Lloyds of London Insurance Company. Affiant was informed by Lee Pitillo that Lloyds of Londcn was at all times material, the insurer for the defendant, South Carolina State Ports Authority.

4. That affiant was led to believe by said Lee Pitillo that affiant could settle his claim for damages arising out of the accident caused by the negligence of an employee of the defendant, Ports Authority, directly with said Lloyds of London by dealing with Lee Pitillo directly and without counsel.

5. That subsequently on or about July of 1990 Lee Pitillo and affiant agreed to a settlement of affiant's claim for Seventy-Five Thousand Dollars (75,000.00).

6. Despite repeated reassurances by Lee Pitillo, no settlement check arrived or was ever tendered to affiant prior to December, 1990.

7. In December, 1990 affiant consulted an attorney in Wisconsin who immediately advised affiant of potential Stat-

ute of Limitation problems and who made inquiry through Threshermen's Mutual insurance Company, the workman's compensation carrier as to the appropriate Statute of Limitations for personal injuries in South Carolina. Affiant's Wisconsin counsel was advised by David Williams, an Adjuster for Threshermen's Mutual Insurance Company, that South had a three (3) year Statute of Limitations and no filing requirements.

8. That affiant immediately retained counsel and changed his position to his detriment because of the breach of contract for settlement that Lloyds of London committed by not forwarding a settlement check within a reasonable time.

9. That affiant verily believes that affiant was intentionally or negligently strung along by Lee Pitillo and Lloyds

of London and that same were agents for the defendant, State Ports Authority.

10. That affiant verily believes that the defendant should be estopped from asserting forum or Statute of Limitation defenses because of the conduct described above.

/s/ Fred W. Ristow
Fred W. Ristow

Subscribed and sworn to before me
this 9th day of March 1992.

/s/ Gail A. Schulz
Notary Public, State of Wisconsin
My Commission expires March 28, 1993.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA,

CHARLESTON DIVISION

SAMUEL COAKLEY,

Plaintiff,

CIVIL ACTION NO. 2:87-1442-2

ORDER

VS.

SOUTH CAROLINA STATE PORTS AUTHORITY; W. DON WELCH, Executive Director, and HENRY TECKLENBURG, JR., H. DON MCELVEEN, ROBERT V. ROYALL, JR., JAMES B. MOORE, THEODORE GUERARD, ERNEST L. WILLIS, JOSEPH P. GRIFFITH, HARRY A. CHAPMAN, and THOMAS F. HARTNETT, Members of the Board of the South Carolina State Ports Authority,

Defendants.

Plaintiff is a former employee of the South Carolina State Ports Authority (SPA) and has brought this suit under 42 United States Code section 1983 challenging the constitutionality of his termination. Plaintiff seeks, inter

alia, reinstatement, back pay, and damages. The defendants are the SPA, its Executive Director, and members of the SPA Board of Directors as of June 1, 1987. The individual defendants are all sued in their official capacities only.

This matter comes before the court now on defendants' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A hearing was held on this matter in Charleston, South Carolina, on May 31, 1988. Defendants move to dismiss this action on the ground that SPA is an agency or alter ego of the State of South Carolina, and, therefore, is immune from suit in federal court under the protection of the Eleventh Amendment. Further, the individual defendants argue that they are also immune from suit because they are

being sued in their official capacities, which is actually just another way of suing the State, and, therefore, is barred by the Eleventh Amendment. The individual defendants also rely on the additional ground that they had no personal involvement in the alleged violation of plaintiff's rights, as is required to impose liability under section 1983, and, on its face, the complaint does not allege any personal involvement on their part.

Plaintiff argues that the SPA is not the alter ego or agency of the State and, consequently, is not entitled to Eleventh Amendment protection. Plaintiff further contends that even if the court finds the Eleventh Amendment does apply to the SPA, prospective equitable relief (i.e., reinstatement) can be granted

against the individual defendants under the teachings of Ex parte Young, 209 U.S. 123 (1908).[1] Finally, plaintiff argues that defendants' contention that individual officials cannot be sued without a showing of personal involvement relies on cases involving damage claims against officials in their personal capacities whereas, here, defendants are being sued only in their official capacities and equitable relief is available against them under section 1983, regardless of whether the Eleventh Amendment bars plaintiff's claims for damages.

While the Fourth Circuit has recog-

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[1] The basic doctrine of Ex parte Young is that a federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally.

nized that many factors must be considered in determining whether an entity is an alter ego or agency of the state, that court has specifically identified and discussed four principal factors.

> [I]t is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded. . . . We agree that this is a most important consideration for "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest." Ford Motor Co., 323 U.S. at 464, 65 S.Ct. at 350. Other important inquiries underlying our consideration of eleventh amendment immunity include, but are not necessarily limited to, whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law.

Ram Ditta v. Md. Nat. Capital Park & Planning Comm., 822 F.2d 456, 457-58 (4th Cir. 1987) (footnotes omitted).

In applying these factors to the SPA,

plaintiff first argues that the State Treasury is not responsible for the SPA's expenditures, as explicitly commanded by S.C. Code Ann. section 54-3-140(9) (1976). Plaintiff's Opposition to Defendants' Motion to Dismiss 7. That section reads in full:

> In order to enable it to carry out the purposes of this chapter, the Authority: [m]ay apply for and accept loans and grants of money from any Federal agency for purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof; . . . . (emphasis added).

This section appears to be restricting the SPA with regards to loans and grants from a federal agency, however, there is nothing to indicate that this language is to be read any broader than that or as broad as plaintiff contends. To the contrary, the affidavit of the Chief Financial Officer of the SPA avers that the South Carolina General Assembly appropriated $750,000 for the initial operation of the SPA and made annual appropriations for its operations from 1942 to 1959. Affidavit of William M. Lawrence at Paragraphs 5, 10. Since 1959, the General Assembly has made annual appropriations to pay the principal and interest on general obligation bonds of the State issued to finance capital improvements for the SPA. Id. at Paragraph 6. The State has issued a total of

$105,644,834.30 worth of said bonds to finance SPA's capital improvements, and the proceeds of these bonds were deposited in the State Treasury and distributed to the SPA at the direction of the General Assembly. Id. at Paragraph 7. Although it appears that the operations of the SPA are now essentially self-sustaining,[2] plaintiff has failed to establish clearly that the State would not ultimately be responsible for SPA's expenditures, including any judgment that might be awarded against it.

Another factor to consider under Ram

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[2] All net earnings of SPA not needed for the operation of its business have been paid into the State Treasury and held subject to further action of the General Assembly; since its creation, SPA has paid a total of $1,552,880.62 of such net earnings into the State Treasury. Affidavit of William M. Lawrence at Paragraph 4.

Ditta is whether the entity exercises a significant degree of autonomy from the state. Plaintiff argues that the SPA has the power to sue and be sued, to make contracts, to acquire and dispose of real estate, and its budget is approved only by its own board, rather than the State Budget and Control Board. Plaintiff's Opposition to Defendants' Motion to Dismiss at 8.

On the other hand, SPA was created by statute as an "instrumentality of the State" for the purpose "[i]n general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State." S.C. Code Ann. Sec. 54-3-130(9). SPA is governed by a board whose members are appointed by the governor with the consent

of the Senate. Sec. 54-3-20. Its property is not subject to any taxes or assessments, Sec. 54-3-1050, and all net earnings "not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly." Sec. 54-3-1020. Further, the SPA has been given broad power of eminent domain "not only as to all property of private persons or corporations but also as to property already devoted to public use." Sec. 54-3-150. Based on the foregoing, we are not persuaded that the SPA exercises a significant degree of autonomy from the State; although it appears that SPA enjoys a certain degree of independence, it is apparent that SPA is not significantly autonomous and shares to a great extent in the States's sovereignty.

A third consideration under Ram Ditta is whether the entity is involved with local versus statewide concerns. Here, it is clear that SPA operates and maintains South Carolina's ports for the benefit of the entire State[3] and, consequently, it is primarily involved with statewide concerns.

The final Ram Ditta factor to consider is how the governmental entity is treat-

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[3] See. e.g., 54-3-110. State may improve harbors and seaports through Authority.

Through the Authority the State may engage in promoting, developing, constructing, equipping, maintain and operating the harbors or seaports within the State, namely Charleston, Georgetown and Port Royal, and works of internal improvement incident thereto, including the acquisition or construction, maintenance and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

ed as a matter of state law.[4] Neither party, however, cites South Carolina case law to support its position, and the court was unable to find any such cases on point. Plaintiff primarily relies upon a district court case from the Southern District of New York, Doris Trading Corp. v. S.S. Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y. 1976), and an opinion letter from the South Carolina-Attorney General's Office dated Dec-

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[4] Although this is a consideration, the question of whether an entity is an agency or alter ego of the State is a question of federal, not state, law. Ram Ditta, 822 F.2d at 458 n.5 quoting Blake v. Kline, 612 F.2d 718, 722 (3rd Cir. 1979), cert. denied, 447 U.S. 921 (1980).

ember 8, 1987.[5] Plaintiff acknowledges, though, that federal district courts in the District of South Carolina have consistently held that the SPA is protected by the Eleventh Amendment, and defendants rely, inter alia, on such cases,

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[5] The SPA had instituted an executive incentive pay plan whereby its top executives would receive additional compensation based upon the SPA's annual income and the executives annual salaries. The SPA Board asked the Attorney General's Office for its opinion as to the constitutionality of said practice. In its letter of December 8, 1987 to SPA Board member Thomas F. Hartnett, the Attorney General's Office concluded:

> that the executive incentive pay plan adopted by the governing body of the South Carolina State Ports Authority would probably not be violative of Article 556, Section 30 of the State Constitution or Section 8-15-10 of the Code because the extra compensation would be for services to be rendered in the future by Authority employees who would probably not be considered to be state employees.

e.g. South Carolina State Ports Authority v. Seaboard Air Line Railroad Co., 124 F. Supp. 533 (E.D.S.C. 1954). Of course, none of the authorities cited by either party is binding on this court and, further, they do not evidence how the SPA is treated by the South Carolina state courts.

Although a state court's view of the status-of a governmental entity is a factor for a federal court to consider under the Ram Ditta guideline, questions of Eleventh Amendment immunity are ultimately governed by federal law, Ram Ditta, 822 F.2d at 460, and, consequently, this particular factor is probably the least important one in the alter ego equation. For example, in Ram Ditta the Court of Appeals of Maryland had held that the governmental entity in question

in that case was a state agency and, in turn, the district court relied heavily on that state court's decision in finding that the park' commission was entitled to Eleventh Amendment immunity. On appeal, the Fourth Circuit reversed and concluded that the park commission was not the alter ego of the state because the other three factors, i.e., the state treasury's responsibility for any judgment, the commission's autonomy from the state, and the nature of the commission's functions, all weighed heavily against Eleventh Amendment immunity. Id.

Similarly, in the instant case, our inquiry must go beyond that single f actor of how the SPA may be treated by the state courts and consider "all factors bearing on the federal policy entitling appropriate governmental entities to

eleventh amendment immunity. Id. Balancing all of these criteria, we conclude that the SPA is an agency of the State of South Carolina and, accordingly, is entitled to Eleventh Amendment immunity. Consequently, defendants' motion to dismiss this action as to defendant SPA must be granted.

We are still left to consider defendants' motion as to the individual defendants sued only in their official capacities. Plaintiff has already acknowledged that if the court finds that SPA is protected by the Eleventh Amendment, as we have found, then plaintiff could not recover damages against these individual defendants in their official capacities, since such an award would be tantamount to a judgment against the State and, therefore also prohibited by

the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) (plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself), see also, McConnell v. Adams, 829 F.2d 1319, 1329 (4th Cir. 1987). Consequently, the issue remaining as to the individual defendants is whether this suit can be maintained against them only for the prospective relief of reinstatement.

Plaintiff argues that even where a state agency is immune from suit under the Eleventh Amendment, it has been clear since Ex parte Young, 209 U.S. 123 (1908), that prospective equitable relief can be granted against state officials for violations of the United States Constitution. In this case,

plaintiff alleges violations of the Due Process Clause of the Fourteenth Amendment, and thus contends that a suit for a prospective injunction, viz. reinstatement, lies against the individual members of the SPA Board and its executive director in their official capacities.

The holding in Ex parte Young was that a suit challenging the constitutionality of a state officials action is not one against the state in that case, a federal court enjoined the Attorney General of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment, and the Supreme Court held that the Eleventh Amendment did not prohibit issuance of the injunction. The decision in Young was based on the theory that an uncon

stitutional enactment is void and, therefore, does not "impart to him [the officer] any immunity from responsibility to the supreme authority. of the United States." Id. at 160. Further, since the state could not authorize the action, the officer was "stripped of his official or representative character and subjected in his person to the consequences of his individual conduct." Id.

Not all forms of injunctive relief against state officials are available under the Young doctrine, though, because of the bar of the Eleventh Amendment. Consequently, in Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that when a plaintiff sues a state official alleging a violation of federal law, the federal court could award an injunction that governs the of-

ficials future conduct, but not one that awards retroactive monetary relief. The court explained the distinction, as follows:

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between day and night. The injunction issued in Ex parte Young was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in Ex parte Young. . . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancil-

> lary effect on the state treasury is a permissible and often an inevitable to consequence of the principle announced in Ex parte Young, supra.
> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation. . . . While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State.

Id. at 667-68.

The Young doctrine was recently illustrated in the Fourth Circuit case of McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987). In that case, employees of two Virginia county electoral boards were terminated, and they sued the electoral board members and general county registrar under section 1983 for dam-

ages and for an injunction to reinstate them. The Court of Appeals held that said defendants were acting as state employees and, consequently, the district court erred in awarding damages against them in their official capacities because they were protected by the Eleventh Amendment. Id. at 1329. These defendants were not protected from injunctive relief under the Eleventh Amendment, however, because of the doctrine of Ex parte Young.

> The appellants' actions in failing to rehire the appellees violated the appellees' rights guaranteed by the first and fourteenth amendments. The decision of the district court finding. such a violation is accordingly affirmed. Since the state's eleventh amendment immunity does not protect it from suits for injunctive relief governing its officials' future conduct, the order of the district court requiring the appellants to rehire the appellees is also affirmed. Ex parte Young, 209 U.S.

123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)

Id. at 1329-30.

Based on the foregoing, we agree with plaintiff's position in the instant case, that if he can prove the individual defendants sued in their official capacities violated his federal constitutional rights, plaintiff would be entitled to seek prospective injunctive relief against said defendants. Defendants contend, however, that plaintiff will be unable to prove liability against them under section 1983 because plaintiff cannot show that they were personally involved in the alleged deprivation of plaintiff's rights, and, in fact, the complaint fails even to allege any personal involvement on their part. Further, defendants argue that since section 1983 will not support a claim based

on a respondeat superior theory of liability, see Monell v. Dep't. of Social Services of City of New York, 436 U.S. 658 (1978), plaintiff's complaint fails to state a cause of action against them, and the individual defendants should be dismissed. Plaintiff agrees with defendants that officials cannot be sued under section 1983 without a showing that they were personally responsible for plaintiff's injury when the plaintiff is seeking damages, but he argues that personal involvement is not a requirement under section 1983 when the relief sought against the defendants is a prospective injunction. Plaintiff cites no authority for this position.

In considering a motion to dismiss, a complaint must be construed in the light most favorable to the plaintiff and its

allegations are taken as true. 5 C. Wright A. Miller, Federal Practice and Procedure, Sec. 1357 at 594. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Cruz v. Beto, 405 U.S. 319, 322 (1972), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

As the defendants contend, the complaint in this case does not allege personal involvement by the individual defendants. The complaint does allege, however, that said defendants have "ultimate supervisory responsibility for SPA operations," Complaint Paragraph 5, and it is well-established in the Fourth Circuit that under section 1983 "super-

visory officials may be liable in certain circumstances for the constitutional injuries inflicted by their subordinates." Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984); see also Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980), cert. denied, 450 U.S. 929 (1981). Liability in this context is not based on respondeat superior, "but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict ..." Id. Supervisory liability in this context may extend to the highest levels of state government. Id. at 373. "The outer limits of liability in any given case are determined ultimately by pinpointing the persons in the decisionmaking chain whose deliberate indif-

ference permitted the constitutional abuses to continue unchecked." Id. Consequently, this determination of liability generally turns on the facts and not law. Id.; see also Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981).

Turning to the facts here, according to Paragraph 5 of plaintiff's complaint, defendants Willis, Hartnett, and Guerard were not members of the SPA Board at the time of the events alleged in the complaint. Consequently, said defendants could not be persons in the decisionmaking chain whose supervisory indifference may have been a causative factor in the constitutional injuries allegedly inflicted on plaintiff. On the other hand, defendants Tecklenburg, McElveen, Royall, Moore, Griffith, and Chapman were

members of the board at the time of said events and Welch was SPA's executive director; accordingly, these defendants' supervisory indifference could have been a causative factor in this case.

The plaintiff must meet a heavy burden of proof in supervisory liability cases and, ordinarily, it cannot be satisfied by pointing to a single incident or isolated incidents. Slakan, 737 F.2d at 373. Still, in considering this complaint in the light most favorable to the plaintiff, it does not appear to us beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to the equitable relief requested. Cruz v. Beto, 405 U.S. at 322. Consequently, we must deny the individual defendants' motion to dismiss as to defendants Welch, Tecklenburg,

McElveen, Royall, Moore, Griffith, and Chapman. Said motion is granted, however, as to the defendants who were not members of the board at the time of the alleged events, viz., as to defendants Willis, Hartnett, and Guerard.

In summary, defendant SPA's motion to dismiss is granted because it is an agency of the State and, therefore, entitled to Eleventh Amendment protection. Similarly, the Eleventh Amendment protects the individual defendants sued in their official capacities from an award for damages. Plaintiff may, however, maintain its suit against the individual defendants Welch, Tecklenburg, McElveen, Royall, Moore, Griffith, and, Chapman for the prospective relief of reinstatement. Defendants Willis, Hartnett, and Guerard are dismissed from the case be-

cause plaintiff could not possibly prove supervisory liability against them under section 1983, since they were not members of the board at the time of the alleged events.

AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

DATED:

At Florence, South Carolina

July 15, 1988.

Supreme Court, U.S.
FILED
OCT 18 1995

No. 95-456

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

FRED W. RISTOW and SUSAN M. RISTOW,
Petitioners,

V.

THE SOUTH CAROLINA STATE PORTS AUTHORITY AND THE S.S. UNKNOWN, an unknown ocean going ship,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Is the opinion and decision in this case rendered by the Fourth Circuit Court of Appeals in conformity with the applicable principles in the opinion and decision of this Court in Hess v. Port Authority Trans-Hudson Corporation?

B. Is the "Solvency" factor whether the State's purse is vulnerable or is it whether the judgment would be paid from the account denominated "State Treasury?"

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NO. 95-456

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

FRED W. RISTOW and SUSAN M. RISTOW,
Petitioners,

v.

THE SOUTH CAROLINA STATE PORTS AUTHORITY and THE SS UNKNOWN,
an unknown ocean going ship,
Respondents.

On Petition For A Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
For The Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE SOUTH CAROLINA STATE PORTS AUTHORITY

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is the

Eleventh Amendment of the United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The statutes involved are quite lengthy, and their texts are located in the two Appendices. S.C. Code Ann. § 54-3-10 et seq. (1976 and Supp. 1992) is found on page E2 of Petitioners' Appendix. In Respondent's Appendix, the following statutory provisions are found: S.C. Code Ann. §§ 1-3-240; 2-17-130; 8-13-100; 9-1-10; 9-1-20; 15-78-10; 15-78-20; 15-78-30; 15-78-40; 15-78-100; 15-78-110; 15-78-120; 30-4-15; 30-4-20; 30-4-30; 42-7-60; 48-39-150; 54-3-10; 54-3-20; 54-3-130; 54-3-140; 54-3-150; 54-3-170; 54-3-610; 54-3-860; 54-3-1010; 54-3-1020; 54-3-1040; and 54-3-1050.

STATEMENT OF THE CASE

Error and Omissions in Petitioner's Statement of Case

I. The Parties

We dispute Plaintiffs' claim that Ristow is a stevedore.

The nature and status of the Defendant South Carolina State Ports Authority ("S.C. Ports Authority") is the principal issue. The scanty and argumentative description of the S.C. Ports Authority by the Petitioner is inadequate.

The S.C. Ports Authority is purely the State of South Carolina: it has no local interest or control; it has no private interest, investment, or control; and it involves no interest of another state or of the federal government.

The Petition erroneously describes the powers of the S.C. Ports Authority as "highly autonomous." (Petition P. 51) While its powers are special because of the S.C. Ports Authority's special mission, it has no autonomy as defined in Black's Law Dictionary 122 (5th ed. 1979). It is not independent of the State or self-governing.

The following facts were presented to the Court of Appeals: The S.C. Ports Authority was created by 1942 Act Number 626 of the South Carolina General Assembly. This Act is now incorporated in S.C. Code Ann. §§ 54-3-10 to 54-3-1050 (1976 & Supp. 1992). (Relevant portions of which are reprinted in Respondent's Appendix.)

The S.C. Ports Authority is governed by a Board, all the members of which are appointed by the Governor of the State of South Carolina, with the advice and consent of the South Carolina Senate. S.C. Code Ann. § 54-3-20 (1976). (App. p. A13) These members can be removed at any time at the discretion of the governor. S.C. Code § 1-3-240 (App. p. A1, A27)

The property of the S.C. Ports Authority enjoys the same immunity from state and local taxes or assessments as do the other departments and agencies of the State. S.C. Code Ann. § 54-3-1050 (1976). (App. p. A22, A27)

All net earnings of the S.C. Ports Authority not necessary or desirable for the operation of its business shall be and have been held subject to further action of

the South Carolina General Assembly. S.C. Code Ann. § 54-3-1020 (1976). (App. p. A21, A25-A28)

The South Carolina General Assembly appropriated Seven Hundred Fifty Thousand Dollars for the initial operation of capital and maintenance of the ports facilities of the S.C. Ports Authority. The General Assembly of the State of South Carolina made annual appropriations for the operation of the S.C. Ports Authority for the years 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959. (App. pp. A32, A33)

Since 1959, the General Assembly of the State of South Carolina has made annual appropriations to pay the principal and interest on general obligation bonds of the State of South Carolina issued to finance certain capital improvements for the S.C. Ports Authority. (App. p. 33)

The State of South Carolina has issued a total in excess of One Hundred Thirty-two Million Dollars worth of these general obligations bonds. The proceeds of these bonds were deposited in the State Treasury and were distributed to the Authority on the direction of the General Assembly. (App. p. 33)

The employees of the S.C. Ports Authority are under the State Employees Workers' Compensation Plan [S.C. Code Ann. § 42-7-60 (1976, as amended)], and the South Carolina Retirement System (for State employees). S.C. Code Ann. §§ 9-1-10, 9-1-20 (1976, as amended). (App. pp. A2, A3, A11, A28)

The S.C. Ports Authority is, and has been, engaged in promoting, developing, constructing, equipping,

maintaining and operating the harbors and seaports within the State, (namely Port Royal, Charleston and Georgetown) for handling of water-borne commerce from and to any part of the State and other states or foreign countries and the fostering of the shipment of freight and commerce through said ports, whether originating within or without the State. S.C. Code Ann. § 54-3-130 (1976, as amended). (App. pp. A13, A29)

The S.C. Ports Authority has a broad power of eminent domain and has exercised this power. S.C. Code Ann. 54-3-150 (1976, as amended). (App. pp. A18, A29)

The S.C. Ports Authority has the power to take exclusively, occupy, and use and possess (insofar as may be necessary to carry out its functions) any area of land owned by the State of South Carolina, the counties of Beaufort, Georgetown and Charleston, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, and the sea and arms thereof and other waters of the State and riparian rights thereto pertaining. The S.C. Ports Authority has exercised this power. S.C. Code Ann. § 54-3-170 (1976, as Amended). (App. pp. A19, A29-A30)

The general obligation bonds issued by the State of South Carolina to fund some of the projects of the S.C. Ports Authority are paid (both interest and principal) from the general state funds appropriated by the General Assembly. (App. p. A33)

In addition, revenue bonds have been issued by the S.C. Ports Authority to fund some of the projects of the S.C. Ports Authority and are authorized by State law. S. C. Code Ann. § 54-3-1010 (1976, as Amended). Other

agencies of the State issue revenue bonds in the same manner as does the S.C. Ports Authority. The S.C. Ports Authority revenue bonds are tax exempt. (App. pp. A34-A35)

In 1992, the State of South Carolina designated the S.C. Ports Authority as the agency to acquire the site for the new BMW plant in Spartanburg County, and to perform other obligations of the State to BMW. Thirty-two Million Dollars were transferred from the State Treasury to the account of the S.C. Ports Authority to pay the purchase price of the land. An additional Eight Million Dollars was transferred to prepare the site for BMW's use. The S.C. Ports Authority also used Five Million Dollars of funds already in its account to provide additional funds to acquire the property for this plant site. (App. p. A35)

The S.C. Ports Authority is listed as an agency for the State in each annual Legislative Manual, and its operations are included in each annual Comprehensive Financial Statement of the State of South Carolina. (App. p. A35)

The S.C. Ports Authority has no stock, no stockholders, and no private interests in its operations. (App. p. A35)

The S.C. Ports Authority and its officials and employees are subject to the State Ethics Act. S.C. Code Ann. § 2-17-130 and § 8-13-100 (1976, as Amended). (App. pp. A1, A35)

The S.C. Ports Authority appoints and hires the Executive Director of the S.C. Ports Authority, and he

serves at the pleasure of the board. The Board of the S.C. Ports Authority supervises the employment of all other employees of the S.C. Ports Authority. (App. p. A36)

The Staff of the S.C. Ports Authority works with the staff of the other State agencies on a daily basis. (App. p. A36)

The S.C. Ports Authority publishes its annual report in newspapers throughout the State (S.C. Code Ann. § 54-3-1040), and delivers it to the General Assembly. S.C. Code Ann. § 54-3-860 (1976, as Amended). (App. pp. A20, A22, A36)

The S.C. Ports Authority has quasi-police type controls over the Port (See title 54 of S.C. Code) and must approve [S.C. Code Ann. § 54-3-610, (1976, as Amended)] or certify all private piers in the Port of Charleston, and in other critical areas. [See §§ 48-39-150 (1976, as Amended)] (App. pp. A12, A20, A36)

Loss claims and legal tort actions against the S.C. Ports Authority are controlled by the South Carolina Tort Claims Act. See S.C. Code Ann. §§ 15-78-10, 15-78-20, 15-78-30, 15-78-40, 15-78-100, 15-78-110 (1986, as Amended). (App. pp. A3-A8) The S.C. Ports Authority is also subject to the S.C. Freedom of Information Act S.C. Code Ann. §§ 30-4-15, 30-4-20, 30-4-30 (1976, as Amended). (App. pp. A10, A11). The S.C. Ports Authority may hold property either in its name or in the name of the State. S.C. Code Ann. § 54-3-140 (1976, as Amended). (App. pp. A15, A36)

In a very real sense, the S.C. Ports Authority is an agency of the State of South Carolina. It shares in the

state's sovereignty and is completely identified with the State. Its functions are unquestionably of a governmental character. It is very much a part of the State. (App. p. A36)

II. The Incident in Question

The S. C. Ports Authority disputes the facts of the incident involved as set forth in the Petition on pages 5 through 8. We acknowledge that Petitioner had an accident on that day and in the general location, and that he may have been injured.

The insurer is inaccurately identified as "Lloyds of London" (Petition p. 7), when the insurer is actually a group of corporate insurers belonging to the London Institute of Underwriters. We have no direct information as to the matters described on page 7 of the Petition. We are informed and believe that the Adjuster ordered the proposed settlement check of $75,000.00. When the check arrived he tendered the check to Petitioners, but Petitioners refused to accept the check or sign settlement papers. The Adjusters then advised Petitioners that the statute of limitations would run in a few days, and that they should act promptly. Petitioners' statement acknowledges that they checked on the statute before it ran, but received false information from a party unrelated to this action. (Pet. App. p. H 3&4.)

The first and second claims alleged in Petitioners' Complaint are covered by the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-110 (1986, as Amended) provides that any action covered by that Act is barred unless commenced or a verified claim filed within two years after the occurrence. S.C. Code Ann. § 15-78-100

requires that the action be brought in the State Circuit Court in the County where the act or omission occurred. S.C. Code Ann. § 15-78-20(e) specifically states:

> (e) Nothing in this chapter is construed as a waiver of the State's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.

Petitioners commenced this action in the United States District Court for the District of South Carolina almost three years after the incident of December 20, 1988, and Petitioners never filed a verified claim. (Appendix of Petitioners at D15 and D16). Petitioners claimed a waiver disallowed under South Carolina Law (Appendix of Petitioners at D15 and D16, and Rink v. Richland Memorial Hospital, __ S.C. __, 422 S.E.2d 747 (1992) and Searcy v. Dept. of Education, 303 S.C. 544, 402 S.E.2d 486 (Ct. App. 1991).

SUMMARY OF THE ARGUMENT

The South Carolina State Ports Authority meets the standards for Eleventh Amendment protection because it was created by the state and it is operated and controlled by a state appointed board. There is no private, local, or other-state interest or control in or over this Authority.

This Authority meets the tests set forth in Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. __, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994) because the

federal courts are here being used by the Ristows in an attempt to pursue a state law tort claim in violation of the South Carolina Tort Claims Act, thereby offending the dignity of the state. This Authority meets the solvency test in Hess because it has been and continues to be funded by the state, all of its funds and assets come directly or indirectly from the state, and its accounts are used as a state treasury.

South Carolina specifically denies by statute any waiver of Eleventh Amendment Immunity (S.C. Code § 15-78-20(e)), and designates that such tort actions must be brought in state court with 2 years after the act or omission occurred. S.C. Code § 15-78-100.

V. ARGUMENT

A. The S.C. Ports Authority meets the Eleventh Amendment Immunity Tests of Hess

Writing for the Hess Court, Justice Ginsburg observes that "[t]he Eleventh Amendment largely shields States from suit in federal court without their consent...." Hess, 115 S.Ct. at 400. Two purposes are served by this arrangement: the protection of the State's dignity and the protection of the State's solvency. Id., at 406. Originally, in protecting the State's solvency, the Eleventh Amendment shielded the states from having the federal courts deplete their treasuries to pay Revolutionary War debts. Id., at 400. More recently, jurisprudence has held that the purpose of this shield is "a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity", "thus accord[ing] the States the respect owed them as members

of the federation", and "emphasiz[ing] the integrity retained by each State in our federal system". Id., at 400. This Court has directed that "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide." Id., at 404.

The S.C. Ports Authority meets this Eleventh Amendment analysis on both counts. To deny the S.C. Ports Authority sovereign immunity in the federal courts would damage both the dignity of the State of South Carolina and its treasury.

1. Denial of Eleventh Amendment Immunity Would be an Affront to the Dignity of South Carolina

This action by Ristow is an apparent move to by-pass the provisions of the S.C. Tort Claims Act. S.C. Code Ann. §§ 15-78-10, et seq. Ristow seeks to avoid the forum specified and designated by that act. S.C. Code Ann. § 15-78-100(b)(1986). Petitioners' Brief, at 64. Ristow also seeks to by-pass its statute of limitations [S.C. Code Ann., §§ 15-78-100(a) and 15-78-110 (1986)], and to avoid its cap on the amount of recovery. S.C. Code Ann., § 15-78-120 (1986). Petitioners' Brief, at 56. Ristow seeks to gain these advantages over the citizens of South Carolina who are bound by the express statutory restrictions placed on the same types of claims. Thus, Ristow mounts a massive flank attack on the South Carolina Tort Claims Act using the federal courts as a vehicle. South Carolina's integrity would be compromised if such an attack were successful, because South Carolina has never consented to power sharing for its agencies as did the states of New York and New Jersey. Hess, 115 S.Ct. at 401.

The Complaint alleges a claim of negligence against the S.C. Ports Authority. Torts against the state are governed by the South Carolina Tort Claim Act. S.C. Code Ann., §§ 15-78-10, et seq. (1986, as Amended). This act expressly includes state authorities such as the S.C. Ports Authority . S.C. Code Ann., §§ 15-78-30 and 15-78-40 (1986, as Amended). Therefore, unlike many of the older federal cases where Eleventh Amendment immunity was denied, the state here has provided a forum for Ristow's Complaint.

All claims mentioned by the Complaint arose after passage of the S.C. Tort Claims Act. This Act states that the General Assembly intended to preserve immunity from liability and suit in tort except as waived in the Act. S.C. Code Ann., § 15-78-20(b). The Act further expressly states that: "[j]urisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred." S.C. Code Ann., §§ 15-78-100(b). Furthermore, § 15-78-20(e) specifically disclaims any waiver of the state's Eleventh Amendment immunity.

The designation by the state of where suit may be brought is to be given effect under the Eleventh Amendment. As stated by this Court, "[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L.Ed.2d 67 (1984) (emphasis original). It is established law that a state waiving immunity from suit in its own Courts does not constitute waiver of the Eleventh Amendment or consent to submit to jurisdiction in Federal Courts. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 87

L.Ed.2d 171 (1985). Therefore, since the state has provided a forum for this type of action, this suit should have been brought in state Court, and was properly dismissed from federal court.

Many factors combined in the Hess case to show that denying Eleventh Amendment immunity was not an affront to the dignity of the States of New York and New Jersey. Prominent in that case was the fact that the N.Y.-N.J. Port Authority is a bistate entity. The very structure of a bistate entity puts it in a different position from a state agency such as the S.C. Ports Authority. This Court noted that bistate entities are formed by not one, but "three discrete sovereigns: two States and the federal government." Hess, 115 S.Ct. at 400. The mission of such entities is to address interests that cross State lines, and region-wide problems. Id., at 400-401. This Court even noted that a compact with Congressional consent is a "means of safeguarding the national interest." Id., at 401.

Therefore, for an entity such as the N.Y.- N.J. Port Authority, "[s]uit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court ... is ordained by one of the entity's founders." Id., at 401. "Nor is the integrity of the compacting States compromised" because under the Constitution, States agreed to such power sharing and coordination for bistate entities. Id., at 401. So important is the issue of a bistate entity, that when one exists, it raises a presumption that Eleventh Amendment immunity does not exist. Id., at 402.

Obviously, this is a major difference between the N.Y.- N.J. Port Authority and the S.C. Ports Authority. The S.C. Ports Authority was created by one state alone. Its mission is to stimulate water-borne commerce through

the harbors and seaports of South Carolina. South Carolina has neither surrendered nor shared any portion of its authority over the S.C. Ports Authority with another state or with the federal government. And Ristow's claim is primarily a State Tort action.

The fact that the N.Y.- N.J. Port Authority is a bistate entity created other problems for it as well. The Court notes that this means political accountability is diffuse, and it is without a tight tie to the people of one state. Id., at 401. The legislation creating the compact calls it a "joint or common agency", not a State agency. Id., at 403. The legislation creating the compact has the effect of insulating the two states from the debts of the N.Y.- N.J. Port Authority in a way not experienced by a State Agency. This Court noted that it was conceived as a "fiscally independent entity financed predominantly by private funds" which "generates its own revenues, and for decades has received no money from the States." Id., at 403. The States have even agreed to an annual limit of $100,000.00 each to help meet only administrative expenses, if needed, and only with the approval of each governor. Id., at 403. All of which effectively insulates the N.Y.-N.J. Port Authority from direct control by any one State so that it is "two or more steps removed from popular control." Id., at 401.

> In sum, within any single State in our representative democracy, voters may exercise their political will to direct state policy; bistate entities created by compact, however, are not subject to the unilateral control of any one of the States that compose the federal system.
>
> Accordingly, there is good reason not to

> amalgamate Compact Clause entities with agencies of 'one of the United States' for Eleventh Amendment purposes.

Id., at 402.

The factors in Hess which did indicate immunity were insufficient to overcome the presumption created by its bistate status. Factors listed in favor of immunity were state appointments for commissioners, the ability of the governors to block actions of their Commissioners, and the ability of both state legislatures (acting together) to enlarge the powers of the N.Y.- N.J. Port Authority. Id., at 402-403. This Court noted that State courts had repeatedly typed the N.Y.- N.J. Port Authority as a State agency. Id., at 403. Nonetheless, due to the nature of the Bistate entity and the relationship thereby created between the federal government and the States, it was not disrespectful to the States, nor was there any "genuine threat to the dignity of New York or New Jersey in allowing Hess and Walsh to pursue FELA claims against PATH in federal court...." Id., at 404.

By contrast, the S.C. Ports Authority is a true state agency. Not only do the enabling statutes (S.C. Code Ann. §§ 54-3-10, et seq.), and the State courts [See South Carolina Farm Bureau Marketing Association v. South Carolina State Ports Authority, 278 S.C. 198, 293 S.E.2d 854 (1982), and South Carolina Tax Commission v. South Carolina State Ports Authority, (S.C. Tax Commission, Nov. 9, 1980). Respondent's App. pp. A23-A26.] refer to it as such, but the structure and operations of the agency reflect it. It was created by and is subject to the legislature of South Carolina. All of its members are appointed by the State's governor with the advice and consent of the Senate. As discussed in detail below, the

funds of the S.C. Ports Authority are part of the State's funds, and the State uses them accordingly. The State provides a large part of the S.C. Ports Authority's budget through its general obligation bonds, and has placed no annual restriction on the amount the State will pay toward its operating expenses. Unlike the Port of New York and New Jersey, the S.C. Ports Authority does not operate in a "defined geographic area." Hess, 115 S.Ct. at 398. The S.C. Ports Authority's domain is the entire state, with foreign trade zones in Greenville and Richland counties (the upper and mid sections of the State) and an inland port in Spartanburg County, not to mention the three coastal ports in Charleston, Georgetown, and Beaufort Counties. Board members are appointed from all over the state, and there is no requirement here that they live within proximity to a Port. In short, the S.C. Ports Authority was created to serve the entire State of South Carolina by acting as an engine for its industry, agriculture, and business, and it has done just that.

Furthermore, as discussed above and unlike the States of New York and New Jersey, the State of South Carolina has specifically reserved control over the S.C. Ports Authority as to legal claims by expressly reserving its Eleventh Amendment immunity. And unlike Hess where the claims arose under federal law [(FELA); Hess, 115 S.Ct., at 401], the claim of Ristow is basically a state law action, a tort claim.

Whereas the legislation creating the Port of New York and New Jersey has the effect of distancing that entity from State control, the legislation creating South Carolina's Port Authority has the opposite effect. Unlike the N.Y.- N.J. Port Authority, the S.C. Ports Authority is not "two or more steps removed from popular control."

Id., at 401. To the contrary, South Carolina has jealously guarded this agency, knowing what its mission means to the State. For all of these reasons, denial of Eleventh Amendment immunity would indeed be an affront to the dignity of the State of South Carolina.

2. South Carolina's Purse is Vulnerable

After determining there was no affront to the dignity of the States of New York and New Jersey, Articles III and IV of the Hess opinion dealt with the "vulnerability of the purse" requirement. This Court determined that the N.Y.- N.J. Port Authority operation did not make the purse of its parent states vulnerable because of its long history of paying its own way. Hess, 115 S.Ct. at 405. The opinion states that agencies that "place heavy fiscal tolls on their founding States" (Id., at 405), or a state agency that "depends for its existence on a state-provided 'financial safety net of broad dimension'", or "[w]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." Id., at 405.

For its first eighteen years, operating costs of the S.C. Ports Authority were paid by annual appropriation by the S.C. General Assembly. (App. p. A32) Since that time, the S.C. Ports Authority has financed much of its capital expenses by general obligation bonds which pledge the full faith and credit of the State. (App. P. A33) The principal and interest on these bonds is paid by annual appropriations of the South Carolina General Assembly. (App. p. A33) This was not the situation in the Hess case. Hess, 115 S.Ct. at 399. Furthermore there has been a

deposit of substantial general state funds in the account of the S.C. Ports Authority, thereby making the S.C. Ports Authority account a state treasury and making South Carolina's situation very different from that of the Hess case. In Hess, the N.Y.- N.J. Port Authority had received no funds from its parent states since 1934, Id., at 405, and the states' role in its financing was described as: "if the Authority is ever in need of financial support, the states will be there to provide it." Hess, 115 S.Ct. at 398.

The S.C. Ports Authority's continued financial support from the State, its ability to tap the State's Treasury, and its ability to pledge the State credit puts it into the category of State agencies held entitled to Eleventh Amendment immunity. Id., at 405.

Any judgment against the S.C. Ports Authority would be paid with state funds, or by the sale of state property, or by insurance whose premiums were paid with state funds. All funds available to the Authority come or came from the state treasury, from rental of state property, or from fees charged for services rendered by state employees.

Ironically, had Ristow commenced this action in the prescribed court and within the prescribed time, any judgment would have been against the S. C. Ports Authority account at a time when it contained $40 Million of general state funds for the BMW project. (App. p. A35) None of the cases cited by Ristow contain the commingling of state funds which are present in this case. While the account labeled "State Treasury" was protected, state funds and state property were not.

If the General Assembly decided to abolish the S.C.

Ports Authority, no person or body could claim the property or the funds then in the name of the S.C. Ports Authority against the state. Applying an "actual financial analysis", everything in the S.C. Ports Authority's name belongs to the state, and Ristow's action is one for recovery of money from the state. "And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit...." Ford Motor Co., v. Department of Treasury of State of Indiana, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). Ristow's suggested interpretation of the Eleventh Amendment is unrealistically narrow and technical.

3. The Fourth Circuit Decision in this case is Harmonious with that of the Hess Case.

In the first ruling on this case [Ristow v. South Carolina Ports Authority 27 F.3d 84 (4th Cir. 1994), hereinafter "Ristow I"], the Fourth Circuit held: "[i]t is clear that the Ports Authority owes its very existence and current financial position to the state's coffers." Ristow I, 27 F.3d at 86; and "[t]he state's withdrawal of excess Ports Authority funds and its commingling of state funds with those of the Ports Authority in transactions like the BMW transaction are a strong indication that the funds of the Ports Authority belong to the state and that a tort recovery out of those funds would constitute one from the state treasury." Id., at 86.

The first and second decisions of this case by the Fourth Circuit treat the responsibility of the State treasury as the most important factor. Ristow I, at 868, and Ristow v. S. C. State Ports Authority, ___ F.3d ___ (4th Cir. 1995) (Hereinafter "Ristow II," and reprinted in Petitioners'

Appendix at A1.)

In Ristow II, the Circuit Court concluded:

> All of this convinces us that, unlike Port Authority Trans-Hudson, the entity considered in Hess, the Ports Authority is not self-sufficient. It is true that a judgment against the Ports Authority cannot be legally enforced against the state. The practical effect of South Carolina's treatment of the fiscal affairs of the Ports Authority, however, definitively implicates the state treasury. Obviously, the legislature will not be able to withdraw net revenues "not necessary or desirable for operation" if the Ports Authority's operational funds have been depleted by judgments against it. Likewise, to the extent that a judgment would deplete its resources, the Ports Authority would be unable to utilize earnings for necessary capital improvements, and so would continue to depend on the state treasury for these required expenditures. To deny Eleventh Amendment immunity in these circumstances would ignore economic reality.

Ristow II, ___ F.3d ____ (4th Cir. 1995), Pet. App. at A15-18.

4. Some Significant Differences between the New York-New Jersey Port Authority and the South Carolina State Ports Authority.

There are important differences between the facts and the applicable law in the Hess case and the facts and applicable law in the case at hand.

a. The defendant in Hess was a separate railway corporation established by the Bistate Port Authority of New York and New Jersey (hereinafter "N.Y.-N.J. Port Authority"). Hess, 115 S.Ct. at 397 and 399. The N.Y.-N.J. Port Authority was created by a compact between the parent states and signed by the United States. Id., at 398 and 401. It was formed as a device for dealing with regional interests and as a means of safeguarding national interests. Id., at 401. As a signer of the charter, the United States was also a founder of the N.Y.-N.J. Port Authority. Id., at 401 and 404. It is noted in Section II of the Hess opinion that such bistate bodies occupy a significantly different position under the federal system than do the states themselves. Id., at 400.

The S.C. Ports Authority is not a bistate Authority operating under such a charter. The United States did not sign its charter and was not one of its founders. Both the operating and the capital costs of the S.C. Ports Authority were paid by the S.C. General Assembly for its first 18 years of operation. (App. p. A32) Since that time, the General Assembly directed the issuance of $132 million of general obligation bonds to pay for S.C. Ports Authority's capital improvements, and it continues to pay principal and interest on these bonds. (App. p. A33) The S.C. Statutes make no provision for private investment in the S.C. Ports Authority. S.C. Code Ann., §§ 54-3-10 et seq.

b. In Hess, the claim was a federal FELA claim

rather than a State law claim. Id., at 401. This, plus the bistate status of the N.Y.-N.J. Port Authority, removed the affront to the dignity of the States. Id., at 401.

In the case at hand, the basic claim is in "negligence", which under South Carolina law is permissible against the S.C. Ports Authority only under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 et seq. (1986). In Hess, the plaintiff could have brought the actions in State court, but in the case at hand the claim of the appellants (hereinafter "Ristow") is barred by the applicable South Carolina statute of limitations. S.C. Code Ann. § 15-78-100 (1986). The Tort Claims Act is the exclusive remedy, and the Eleventh Amendment is not waived. S.C. Code Ann. 15-78-20(e)(1986).(App.pp.A3-A5)

c. Hess creates a legal test for bistate entities, such as the N.Y.- N.J. Port Authority, which would not apply to State agencies like the S.C. Ports Authority. The existence of a bistate entity creates a presumption that the entity does not qualify for Eleventh Amendment immunity. Hess, 115 S.Ct. at 402. To overcome that presumption, the entity must show that "there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose." Id., at 402 and 404. This is a heavy burden to overcome, and one which the N.Y.- N.J. Port Authority was not able to meet. Nonetheless, South Carolina statutes and the practices of the State of South Carolina demonstrate that even these more stringent requirements accurately describe the situation of the S. C. Ports Authority.

d. The N.Y.- N.J. Port Authority did not rely

on its parent states for financial support. It was conceived as a financially independent entity, Hess 115 S. Ct. 398., The N.Y.- N.J. Port Authority sent its profits to the states to finance projects which the states would otherwise finance themselves. Hess, 115 S.Ct. at 405. The N.Y.-N.J. Port Authority last received funds from its states in 1934. Id., at 405. The N. Y.- N. J. Port Authority was to be funded primarily by private investment. Id., at 403. The States agreed to pay only $100,000 per year per state to finance operations "until the revenues from operations ... are adequate to meet all expenditures." Id., at 399.

South Carolina statutes nowhere state or suggest that the S.C. Ports Authority is to be independent. The State has issued One hundred, thirty two million ($132,000,000.00) dollars worth of general obligation bonds to pay for the capital improvements for the S.C. Ports Authority and continues to pay principal and interest on such bonds. (App. p. A33) The operating costs for the first eighteen years of operations of the S.C. Ports Authority were paid by appropriations from the South Carolina General Assembly. (App. p. A32) In 1992, $40 million dollars of State General Funds were deposited in the account of the S.C. Ports Authority, and were distributed by the S.C. Ports Authority for a state project. Pet. App., at A15, n. 7. (App. p. A35) The State of South Carolina continues to supply funds and capital to the S.C. Ports Authority. The amount of General Obligation bonds issued to fund the S.C. Ports Authority increased substantially while this action was in process. Pet. App. at A14.

e. The N.Y.- N.J. Port Authority is controlled by a board of commissioners, half of whom are selected by each state. Hess, 115 S.Ct. at 399. The governor of each

state may veto the actions of Commission members appointed by that state. Id., at 399.

All of the members of the governing board of the S.C. Ports Authority are appointed by the governor of South Carolina with the approval of the South Carolina Senate. S.C. Code Ann., § 54-3-20 (1976, as Amended). These members are removable, at his discretion, by the governor of the State. S.C. Code Ann. § 1-3-240 (1993, as Amended). While it is true that the governor of South Carolina does not have veto power over the actions of the Board, this is the only significant difference between the Hess and the Ristow situation in which the case for Eleventh Amendment immunity is less favorable for South Carolina.

f. The statutes of New York and New Jersey have been determined to consent to litigation in the federal courts of cases against the N.Y.- N.J. Port Authority. Hess, 115 S.Ct. at 400, and Feeney v. Port Authority Trans-Hudson Corporation, 873 F.2d 628 (2d Cir. 1989), aff'd on other grds, 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990). By comparison, S.C. Code Ann. § 15-78-20(e) expressly disclaims any waiver of the Eleventh Amendment. S.C. Code Ann. § 15-78-20(e) (a portion of the S.C. Tort Claims Act) sets the Tort Claims Act and the South Carolina courts as the sole remedy.

B. Is the "Solvency" factor issue whether the "State Purse" is involved, or is it whether the Account denominated "State Treasury" is involved?

The S. C. Ports Authority has shown that its funds are all state funds and that any judgment achieved in cases like this would be paid with state funds mixed with funds

from insurance procured with state funds. Petitioners appear to contend that unless the payment must come from the account labeled "State Treasury," Eleventh Amendment protection is denied. Surely constitutional provisions should not be so narrowly construed.

The statutes creating the Authority gave it the right to have accounts in its own name and to deposit state funds therein. Section 54-3-1020 (App. p. 21). Indeed, State funds are occasionally deposited in the Authority's account in addition to those necessary for its operating or capital expenses (App. p. A35)

We note an important technical error on page 28 of Petitioners' Brief on the "treasury" issue. Petitioner erroneously cites Jacintoport Corp. v. Greater Baton Rouge Port Commission, 762 F. 2d. 435 (5th Cir. 1985) as a "single state [entity]." Louisiana does not have a "State Ports Authority." the Fifth Circuit held properly that the Greater Baton Rouge Port Commission was a local subdivision, even though it had a slice of state power Id p. 437 and 438, and concluded "[T]he object of the Authority's concern is local under the standards set forth by McQuillan, and because it acts for the special advantage of the Baton Rouge Port, it follows that the Commission is performing a proprietary, or local, rather than governmental or statewide, function." Id p. 443. The S. C. State Ports Authority is the authority for all of South Carolina's ports and its function is statewide.

The source of all the South Carolina State Ports Authority funds and property is the State, and funds earned utilizing state employees and state property. Its account is a "state treasury."

In modern state governments, state funds are held in many accounts. To ignore this situation is, as said in Ristow II, to "ignore economic reality." Ristow II, Pet. App. at A18.

VI. CONCLUSION

The South Carolina State Ports Authority is not a marginal case but an agency of the State. It involves no special questions as to local or private interest. The Fourth Circuit reconsidered its earlier opinion in the light of Hess and affirmed it. This court should deny the Petition for Certiorari and affirm the Respondent's Eleventh Amendment immunity from suits in federal Court.

Respectfully Submitted,

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NO. 95-456

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

FRED W. RISTOW and SUSAN M. RISTOW,
Petitioners,

VS.

THE SOUTH CAROLINA STATE PORTS AUTHORITY AND THE S.S. UNKNOWN, an unknown ocean going ship,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

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South Carolina - Administration of the Government

§ 1-3-240. Removal of officers by Governor.

(B) Any person appointed to a state office by a Governor, either with or without the advice and consent of the Senate, other than those officers enumerated in subsection (C), may be removed from office by the Governor at his discretion by an Executive Order removing the officer.

South Carolina - General Assembly (Lobbyists and Lobbying)

§ 2-17-130. Penalties For violations of provisions of this chapter.

(B) A member of the General Assembly, the Governor, the Lieutenant Governor, any other statewide constitutional officer, any public official of any state agency who engaged in covered agency actions, or any of their employees who wilfully violate the provisions of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand five hundred dollars or imprisoned for not more than one year, or both.

South Carolina - Public Officers and Employees (Ethics Act)

§ 8-13-100. Definitions.

As used in Articles 1 through 11:

(25) "Public employee" means a person employed by the State, a county, a municipality, or a political

subdivision thereof.

(27) "Public official" means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. "Public official" does not mean a member of the judiciary except that for the purposes of campaign practices, campaign disclosure, and disclosure of economic interests, a probate judge is considered a public official and must meet the requirements of this chapter.

South Carolina - Retirement Systems

§ 9-1-10. Definitions.

The following words and phrases as used in this chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "*Retirement System*" or "*System*" shall mean the South Carolina Retirement System established under § 9-1-20;

(5) "Employer" shall mean the State, a county board of education, a district board of trustees, a city board of education, the board of trustees or other managing board of any State-supported college or educational institution, or any other agency of the State by which a teacher or employee is paid; the term "employer" also includes a county, municipality, or other political: subdivision of the State, or any agency or department thereof, which has been admitted to the System under the provisions of § 9-1-470....

§ 9-1-20. South Carolina Retirement System created; System shall have powers and privileges of corporation; purposes of System.

A retirement system is hereby established and placed under the management of the State Budget and Control Board for the purpose of providing retirement allowances and other benefits for teachers and employees of the State and political subdivisions or agencies or departments thereof. The System so created shall have the power and privileges of a corporation and shall be known as the South Carolina Retirement System, and by such name all of its business shall be transacted, all of its funds invested and all of its cash, securities and other property held.

South Carolina Tort Claims Act

§ 15-78-10. Short title.

This chapter may be cited as the "South Carolina Tort Claims Act".

§ 15-78-20. Legislative findings; declaration of public policy; extent of, and construction of,waiver of immunity.

(a) The General Assembly finds that while a private entrepreneur may be readily held liable for negligence of his employees within the chosen ambit of his activity, the area within which government has the power to act for the public good has been without limit and, therefore, government did not have the duty to do everything which might have been done. The General Assembly further finds that each governmental entity has financial limitations within which it must exercise

authorized power and discretion in determining the extent and nature of its activities. Thus, while total immunity from liability on the part of the government is not desirable, see McCall v. Batson, neither should the government be subject to unlimited nor unqualified liability for its actions. The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions. Additionally, the General Assembly recognizes the impossibility of insuring for acts retrospectively. The General Assembly seeks an orderly transition to the recognition of individuals' rights against the tortious sovereign as defined herein. Consequently, it is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein. It is further declared to be the public policy of the State of South Carolina that to insure an orderly transition from sovereign immunity to qualified and limited liability that the General Assembly intends to provide for liability on the part of the State and its political subdivisions only from July 1, 1986, forward in prospective fashion. No governmental entity which was not insured at the time of the injury for which compensation is sought is liable under this chapter and those which were insured are liable only to the extent provided herein. Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.

(b) The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to

provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in §15-78-70(b).

(c)(i) As to those causes of action that arise or accrue prior to the effective date of this act, the General Assembly reinstates sovereign immunity on the part of the State, its political subdivisions and employees, while acting within the scope of official duty provided that sovereign immunity' will not bar recovery in any case of action arising or accruing on or before the effective date of this act if the defendant maintained liability insurance coverage.

(ii) In such cases involving governmental health care facilities, as defined in § 15-78-30(j), recovery shall not exceed the limits of the liability insurance coverage up to a maximum recovery of five hundred thousand dollars.

(iii) In all other such cases recovery shall not exceed the limits of the liability insurance coverage.

(d) Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract.

(e) Nothing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be

sued in any state court beyond the boundaries of the State of South Carolina.

(f) The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State.

§ 15-78-30. Definitions.

(a) "Agency" means the individual office, agency, authority, department, commission, board, division, instrumentality, or institution, including a state-supported governmental health care facility, school, college, university, or technical college, which employs the employee whose act or omission gives rise to a claim under this chapter.

(b) "Claim" means any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, caused by the tort of any employee of the State or a political subdivision while acting within the scope of his official duty.

(c) Prior to January 1, 1989, "Employee" means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation....

(d) "Governmental entity" means the State and its political subdivisions.

(e) "State" means the State of South Carolina and

any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state supported governmental health care facilities, schools, colleges, universities, and technical colleges.

(f) "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, but does not include the intentional infliction of emotional harm.

(g) "Occurrence" means an unfolding sequence of events which proximately flow from a single act of negligence.

(h) "Political subdivision" means the counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of § 58-25-20 which provides public transportation on behalf of a regional transportation authority, and special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof.

(i) "Scope of official duty" or "scope of state employment" means (1) acting in and about the official business of a governmental entity and (2) performing official duties.

§ 15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.

The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

§ 15-78-100. When and where to institute action; requirement of special verdict specifying proportionate liability of multiple defendants.

(a) Except as provided for in Section 15-3-40, an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered. Provided, that if a claim for damages was filed and disallowed or rejected an action for damages filed under this chapter, based upon the same occurrence as the claim, may be instituted within three years after the loss was or should have been discovered.

(b) Jurisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred.

(c) In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.

§ 15-78-110. Statute of limitations.

Except as provided for in Section 15-3-40, any action

brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

§ 15-78-120. Limitation on Liability; prohibition against recovery of punitive or exemplary damages or prejudgment interest; signature of attorney on pleadings, motions, or other papers.

(a) For any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:

(1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding two hundred fifty thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

(2) Except as provided in Section 15-78-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed five hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

(b) No award for damages: under this chapter shall include punitive or exemplary damages or interest prior to judgment.

South Carolina - Freedom of Information Act

§ 30-4-15. Findings and purpose.

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

§ 30-4-20. Definitions.

(a) "Public body" means any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority....

(b) "Person" includes any individual, corporation, partnership, firm, organization or association.

(c) "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body....

(d) "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

§ 30-4-30. Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice.

(a) Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.

South Carolina - Workers' Compensation Fund

§ 42-7-60. Officers and employees covered by article.

Notwithstanding anything to the contrary contained in § 42-1-130, the provisions of this article apply to all officers and employees of the State and of any county, municipality, or other political subdivision thereof or any agency or institution of the State which has elected to participate under this article under the provisions. of § 42-7-50....

South Carolina - Environmental Protection and Conservation Act

§ 48-39-150. Approval or denial of permits; appeal to Council.

(A) In determining whether a permit application is approved or denied the Department shall base its determination on the individual merits of each application, the policies specified in §§ 48-39-20 and 48-39-30 and be guided by the following general considerations:

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Department prior to issuing a permit.

South Carolina State Ports Authority

§ 54-3-10. Creation and membership of State Ports Authority.

The South Carolina State Ports Authority is hereby created consisting of a governing body of nine members, hereafter referred to as the Authority.

§ 54-3-20. Appointment and terms of members; vacancies.

The members of the board shall be appointed by the Governor, with the advice and consent of the Senate, for terms of seven years each and until their successors shall have been appointed and have qualified. In the event of a vacancy, however caused, a successor shall be appointed in the manner of original appointment for the unexpired term.

§ 54-3-130. Purposes of Authority.

The Authority is created as an instrumentality of the State for the accomplishment of the following general purposes, all or any of them, which are intended to broaden and not to restrict any other powers given to it in this chapter, namely:

(1) To develop and improve the harbors or seaports of Charleston, Georgetown and Port Royal for the handling of water-borne commerce from and to any part of the State and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve such harbors or seaports and their port facilities;

(3) To foster and stimulate the' shipment of freight and commerce through such ports, whether originating within or without the State, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To cooperate with the United States of America, and any agency or any department, corporation or instrumentality thereof in the maintenance, development, improvement and use of such harbors and seaports in connection with and in furtherance of the war operations and needs of the United States;

(5) To accept funds from any of the counties of Beaufort,Charleston or Georgetown, and to use them in such manner, within the purposes of the Authority, as shall be stipulated by the county and to act as agent or instrumentality for any of such counties in any matter coming within the general purposes of the Authority;

(6) To act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(7) To cooperate and act as co-assurer with the city of Augusta, Georgia, and the Georgia State Ports Authority in furtherance of the river development project known as the Savannah River Project Below Augusta;

(8) To promote, develop, construct, equip, maintain and operate a harbor or harbors within this State on the Savannah River, and in furtherance thereof have all of the powers, purposes and authority given by law to the Authority in reference to the harbors and seaports of Charleston, Georgetown and

Port Royal; and

(9) In general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports.

§ 54-3-140. Powers of Authority.

In order to enable it to carry out the purposes of this chapter, the Authority:

(1) Shall have the powers of a body corporate, including the power to sue and be sued, to make contracts and to adopt and use a common seal and alter it as may be deemed expedient;

(2) May rent, lease, buy, own, acquire, mortgage and dispose of such property, real or personal, as the Authority may deem proper to carry, out the purposes and provisions of this chapter, all or any of them;

(3) May acquire, construct, maintain, equip and operate wharves, docks, ships, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto and the construction of belt line roads and highways and bridges

and causeways thereon and other bridges and causeways necessary or useful in connection therewith and shipyards, shipping facilities and transportation facilities incident thereto and useful or convenient for the use thereof, including terminal railroads;

(4) May acquire, construct, maintain, operate and contract to operate in any of said counties airports, seaplane bases, naval bases and any other facilities necessary or useful in carrying out the purposes of this chapter and of the Authority;

(5) Shall appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation thereof;

(6) Shall establish an office for the transaction of its business in the City of Charleston and such other offices within and without the State as may be deemed by the board to be necessary or useful in carrying out the purposes of this chapter;

(7) May create and operate such agencies and departments as the board may deem necessary or useful for the furtherance of any of the purposes of this chapter;

(8) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Authority and incident to the administration and operation thereof and all other costs and expenses reasonably necessary or expedient in

carrying out and accomplishing the purposes of this chapter;

(9) May apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof;

(10) May act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(11) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the powers granted to it may be enjoyed and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(12) May do any and all other acts and things in this chapter authorized or required to be done, whether or not included in the general powers in this section mentioned;

(13) May do any and all things necessary to accomplish the purposes of this chapter; and

(14) May promulgate rules and regulations governing the use of or doing business on the Authority's property or facilities, including the adoption of safety standards and insurance coverage or proof of financial responsibility, and may provide for the licensing of persons, firms or corporations using or doing business on such property or facilities, and for license fees to cover the expense thereof. Licenses may be revoked after notice and hearing by the Authority for wilful breach of or failure to comply with such rules and regulations.

But the Authority shall not engage in shipbuilding except upon the unanimous vote of its members.

§ 54-3-150. Acquisition of property.

For the acquiring of rights-of-way and property necessary for the construction of terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses, and other riparian and littoral terminals and structures and approaches to them and transportation facilities needful for their convenient use and belt line roads and highways, causeways, and bridges and other

bridges and causeways, and for the acquiring of property necessary for the river development project known as the Savannah River Project Below Augusta, and for the acquiring of property necessary for the development of a harbor or harbors within this State on the Savannah River, the Authority may purchase them by negotiation or may condemn them. The power of eminent domain shall apply not only to all property of private persons or corporations but also as to property already devoted to public use.

§ 54-3-170. Use of certain State property.

The Authority may take, exclusively occupy, use and possess, in so far as may be necessary for carrying out the provisions of this chapter, any areas of land owned by the State and within the counties of Beaufort, Charleston and Georgetown, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the riparian rights thereto pertaining. When so taken and occupied, due notice of such taking and occupancy having been filed with the Secretary of State, such areas of land are hereby granted to and shall be the property of the Authority. For the purposes of this section, the meaning of the term "use" shall include the removal of material from and the placing of material on any such land. In case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provisions of this section shall continue in full force and effect as to all other lands owned by the State. The provisions of this section are subject to all laws and regulations of the United States with respect to navigable waters.

§ 54-3-610. Powers of Authority as to erection or removal of wharves, docks and other structures.

The Authority may fix the lines along the bay and harbor of Charleston and the rivers and creeks flowing therein within which riparian owners may erect wharves, docks and other proper erections and fixtures for commercial, manufacturing or any other purposes. The Authority may cause the removal of any wharf, dock, wreck or other structure that may obstruct navigation or that may, in its opinion, be injurious to said bay, harbor, rivers or creeks, at the expense of the owner or the person causing the obstructions. But the rights of any owner of a wharf whose lines have heretofore been fixed by grant or by authority of State legislation are in no wise to be disturbed.

§ 54-3-860. Authority shall report annually to General Assembly.

The Authority shall annually report to the General Assembly the amounts received for fees, harbor or port charges, fines and penalties and the disbursement thereof and also generally its acts and doings under this article.

§ 54-3-1010. Issuance of bonds.

As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building structure, terminal railroad or any other matter or thing which the Authority is herein authorized to acquire, construct, equip, maintain or operate, all or any of them, the Authority may issue bonds, payable both as to

principal and interest from the revenues to be derived from the operation of all or any part of its properties and facilities, and the powers and authority granted to counties, cities, school districts and other political subdivisions of the State are hereby extended to and made available to the Authority. All revenue bonds issued by the Authority to obtain funds for the acquisition, construction, equipment, maintenance and operation of its properties and facilities shall be issued in accordance with the provisions of §§ 6-21-10 to 6-21-570 and all conditions, restrictions and limitations imposed by said §§ 6--21-10 to 6-21-570 as amended, shall be observed by the Authority in the issuance of such bonds, except as follows:

(1) A pledge of the net revenues derived from the operation of its properties and facilities, all or any of them, rather than its gross revenues, may be made; and

(2) Free service may, in the discretion of the Authority, be afforded to the United States of America, or any agency, department, corporation or instrumentality thereof by any property or facility of the Authority to acquire, construct, equip, maintain and operate which funds were obtained from the revenue bonds purchased and held by a Federal agency, provided such free service is with the consent and at the request of the Federal agency then holding the whole of such revenue bonds.

§ 54-3-1020. Disbursement of funds; surplus.

All funds of the Authority shall be deposited in a bank or banks to be designated by the Authority. Funds of the Authority shall be paid out only upon warrants signed by the treasurer of the Authority and countersigned by the

chairman or the acting chairman. No warrants shall be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this chapter and only when the account or expenditure for which they are to be given in payment has been audited and approved by the Authority. Any and all net revenues or earnings not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly.

§ 54-3-1040. Annual financial statement.

At least once in each year the Authority shall publish once in some newspaper published in Charleston County a complete detailed statement of all moneys received and disbursed by the Authority during the preceding year. Such statement shall also show the several sources from which such funds were received and the balance on hand at the time of publishing the statement and shall show the complete financial condition of the Authority.

§ 54-3-1050. Property of Authority exempt from taxation.

The property of the Authority shall not be subject to any taxes or assessments thereon.

STATE OF SOUTH CAROLINA BEFORE THE SOUTH CAROLINA TAX COMMISSION

IN RE:

A Finding of the Tax Status of Certain Property of the South Carolina State Ports Authority.

FINDINGS OF FACT

The Authority was created by the General Assembly as an instrumentality of the State to develop its harbors and seaports for use in commerce. Section 54-3-10, et seq.

The Authority holds title to certain land situate in Charleston County that is leased or its use licensed to others. The Assessor of Charleston County, acting under the authority os Section 12-37-220A(1), has concluded that certain parcels or tracts of land are taxable. The South Carolina Constitution provides an exemption for property owned by the State when used exclusively for public purposes. Section 12-37-220A(1) provides that the county tax assessor and the Tax Commission shall declare such nonexclusive use and we thus consider the question in that light.

Basically, the use of the various parcels or tracts can be consolidated into two groups. One would be the property of the Authority that is leased or licensed for use in commerce originating, ending or passing through the Authority's port or harbor terminal by private business. This would include the Authority's property on which the goods in commerce may be temporarily stored, collected or assembled. The other group would consist of property,

the use of which is not related to the Authority's duty or purpose; in example, property that is leased to others and used for private vehicle parking spaces.

The State is not in the business of transporting the goods in commerce. It only furnishes the facilities through which commerce is conducted by private business. The dock and terminal correctly were not considered taxable, notwithstanding use of the same by private business. One would not argue that a public highway is taxable because private utilities use a part of the same. the evidence before us establishes that the property that is leased or licensed for commerce purposes results in a decided benefit for the State. The Authority by providing the property is assured of greater cargo tonnage, of shorter dock time for the ocean-going vessels and of the responsibility of loss or theft of the goods. It thus appears to our satisfaction that this constitutes a public purpose and within the duties and powers considered by the General Assembly when the Authority was created.

> "The courts have, as a rule, been reluctant to attempt to define public purpose as contrasted with a private purpose, but have generally left each case to be determined on its own peculiar circumstances. As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private

> purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment." Anderson v. Baehr, 265 S.C. 153, 217 S.E. 2d 43.

We thus find that the property of the Authority is exempt from taxation when leased or licensed to others for actual use in commerce.

The other property of the Authority is not used in connection with its purpose. It is property not presently needed by the Authority and is held for future use. Generally, and as a convenience, it is leased to others for a private use and for purposes not connected with commerce; in example, as parking space for vehicles. We find that this property is subject to taxation in that such use is not for an exclusively public purpose.

CONCLUSION

We conclude that the property of the south Carolina State Ports Authority that is leased or its use licensed to others for use in the business of actually moving or storing goods for transportation in commerce is used exclusively for a public purpose. Any private benefit would be incidental.

We further conclude that property that is owned by the Authority and leased to others and not actually used in moving or storing goods for transportation in commerce is taxable.

The Assessor of Charleston County should identify such property and enter the same upon the records of Charleston County for tax purposes.

AND IT IS SO FOUND AND ORDERED.
SOUTH CAROLINA TAX COMMISSION

s _____
Robert C. Wasson, Chairman

s _____
John H. LaFitte, Jr., Commissioner

s _____
Charles N. Plowden, Commissioner

Columbia, South Carolina

November 18, 1980

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF CHARLESTON)

PERSONALLY APPEARED before me, WILLIAM M. LAWRENCE, who, upon oath duly sworn, states and affirms as follows:

1. My name is William M. Lawrence, and I am the chief financial officer of the South Carolina State Ports Authority and have custody and control of the records of the South Carolina State Ports Authority. I have been employed by the South Carolina State Ports Authority in executive and administrative positions since 1974. Based on the records of the South Carolina State Ports Authority and my own experience, I certify as follows:

a. That the South Carolina State Ports Authority was created by 1942 Act Number 626 of the South Carolina General Assembly. This Act is now incorporated in S. C. Code Ann. § 3-10 to -1050 (1976 & Supp. 1988).

b. That the South Carolina State Ports Authority is governed by a Board, the members of which are appointed by the Governor of the State of South Carolina, with the advice and consent of the South Carolina Senate.

c. That the property of the South Carolina State Ports Authority enjoys the same immunity from state and local taxes or assessments as do the other departments and agencies of the State.

d. All net earnings of the South Carolina

State Ports Authority not necessary or desirable for the operation of its shall be and have been held subject to further action of the South Carolina General Assembly, and the South Carolina State Ports Authority has paid into the State Treasury a total in excess on One and One-half Million Dollars ($1,500,000.00) of such net earnings since its creation.

e. The General Assembly of the State of South Carolina made annual appropriations of the operation of the South Carolina State Ports Authority for the years 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959.

f. Since 1959, the General Assembly of the state of South Carolina has made annual appropriations to pay the principal and interest on general obligation bonds of the State of South Carolina issued to finance capital improvements for the South Carolina State Ports Authority.

g. The State of South Carolina has issued a total in excess of One Hundred Million Dollars ($100,000,000.00) worth of General Obligation Bonds to finance capital improvements for the South Carolina State Ports Authority. The proceeds of these bonds were deposited in the State Treasury and were distributed to the South Carolina State Ports Authority on the direction of the General Assembly.

h. The employees of the South Carolina State Ports Authority are under the South Carolina State Employees Workers' Compensation Act and the State Employees Retirement Plan.

i. The South Carolina General Assembly appropriated Seven Hundred Fifty Thousand Dollars ($750,000.00) for the initial operation of capital and maintenance of the port facilities of the South Carolina State Ports Authority.

j. The State of South Carolina, through the South Carolina State Ports Authority, is, and has engaged in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, namely Port Royal, Charleston, and Georgetown, and works of internal improvements incident thereto, including the acquisition and construction, maintenance and operation of terminal facilities.

k. The South Carolina State Ports Authority was created and is and has been acting as an instrumentality of the State for the accomplishment of general purposes which include development and improvements of the harbors or seaports of Port Royal, Charleston, and Georgetown for handling of water-borne commerce from and to any part of the State and other states or foreign countries and the fostering of the shipment of freight and commerce through said ports, whether originating within or without the state.

l. The South Carolina State Ports Authority has a broad power of eminent domain and has exercised this power.

m. The South Carolina State Ports Authority has the power to take exclusively, occupy, use, and possess insofar as may be necessary to carry out its functions, any area of land owned by the State of South

Carolina, the counties of Beaufort, Georgetown, and Charleston, not in use for State purposes, including swamps and overflow of lands, bottoms of streams, lakes, rivers, bays, and the sea and arms thereof and other waters of the State and riparian rights thereto pertaining and the said South Carolina State Ports Authority has exercised this power.

n. The South Carolina State Ports Authority is an agency of the State of South Carolina, is in a real sense a part of the State and shares in its sovereignty, and is completely identified with the State and the performance of its functions which are unquestionably of a governmental character.

2. I have given this statement freely and voluntarily, and it is true and correct to the best of my knowledge and belief.

Dated this the 24th day of April, 1992.

/s/ William M. Lawrence
William M. Lawrence
Chief Financial Officer
South Carolina State
Ports Authority

SWORN AND SUBSCRIBED
before me this the 24th
day of April, 1992.

/s/ Janice E. Lockridge
Notary Public South Carolina
My Commission Expires: Sept. 24, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and SUSAN M. RISTOW, his wife,	)	Civil Action No. 2:91-3677-2J
Plaintiffs,	)	**SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS**
v.	)	
SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and the SS Unknown, an unknown ocean going ship,	)	
Defendants.	)	

PERSONALLY APPEARED before me, WILLIAM M. LAWRENCE, who, upon oath duly sworn, states and affirms as follows:

1. My name is William M. Lawrence, and I am the chief financial officer of the South Carolina State Ports Authority and have custody and control of the records of the South Carolina State Ports Authority. I have been employed by the South Carolina State Ports Authority in executive and administrative positions since 1974. Based on the records of the South Carolina State Ports Authority and my own experience, I certify as follows:

a. That the South Carolina State Ports Authority was created by 1942 Act Number 626 of the South Carolina General Assembly. This Act is now incorporated in S. C. Code Ann. §§ 54-3-10 to 54-3-1050 (1976 & Supp. 1992).

b. That the South Carolina State Ports Authority is governed by a Board, all of the members of which are appointed by the Governor of the State of South Carolina, with the advice and consent of the South Carolina Senate.

c. That the property of the South Carolina State Ports Authority enjoys the same immunity from state and local taxes or assessments as do the other departments and agencies of the State.

d. All net earnings of the South Carolina State Ports Authority not necessary or desirable for the operation of its business shall be and have been held subject to further action of the South Carolina General Assembly, and the South Carolina State Ports Authority has paid into the State Treasury a total in excess of One Million Five Hundred Thousand Dollars of such net earnings since its creation.

e. The South Carolina General Assembly appropriated Seven Hundred Fifty Thousand and no/100 ($750,000.00) Dollars for the initial operation of capital and maintenance of the port's facilities of the South Carolina State Ports Authority. The General Assembly of the State of South Carolina made annual appropriations for the operation of the South Carolina State Ports Authority for the years 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957,

1958, and 1959.

f. Since 1959, the General Assembly of the state of South Carolina has made annual appropriations to pay the principal and interest on general obligation bonds of the State of South Carolina issued to finance certain capital improvements for the South Carolina State Ports Authority.

g. The State of South Carolina has issued a total in excess of One Hundred Thirty-two Million and no/100 ($132,000,000.00) Dollars worth of general obligation bonds to finance certain capital improvements for the South Carolina State Ports Authority. The proceeds of these bonds were deposited in the State Treasury and were distributed to the South Carolina State Ports Authority on the direction of the General Assembly.

h. The employees of the South Carolina State Ports Authority are under the State Employees Workers' Compensation Plan S.C. Code §§ 42-7-10 et seq. and the South Carolina Retirement System (for State employees) S.C. Code §§ 9-1-10 et seq.

i. The State of South Carolina, through the South Carolina State Ports Authority, is, and has engaged in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, namely Port Royal, Charleston, and Georgetown, and works of internal improvements incident thereto, including the acquisition and construction, maintenance and operation of terminal facilities.

j. The South Carolina State Ports Authority was created and is and has been acting as an

instrumentality of the State for the accomplishment of general purposes which include development and improvements of the harbors or seaports of Port Royal, Charleston, and Georgetown for handling of water-borne commerce from and to any part of the State and other states or foreign countries and the fostering of the shipment of freight and commerce through said ports, whether originating within or without the State.

k. The South Carolina State Ports Authority has a broad power of eminent domain and has exercised this power. (S.C. Code § 54-3-150, 1976, as amended.)

l. The South Carolina State Ports Authority has the power to take exclusively, occupy, use, and possess insofar as may be necessary to carry out its functions, any area of land owned by the State of South Carolina, the counties of Beaufort, Georgetown and Charleston, not in use for State purposes, including swamps and overflow of lands, bottoms of streams, lakes, rivers, bays, and the sea and arms thereof and other waters of the State and riparian rights thereto pertaining and the said South Carolina State Ports Authority has exercised this power. S. C. Code § 54-3-170 (1976 Supp. 1992.)

m. The general obligation bonds issued by the State of South Carolina to fund some of the projects of the South Carolina State Ports Authority are paid (both interest and principal) from the general funds appropriated by the General Assembly.

n. The revenue bonds issued by the South Carolina State Ports Authority to fund some of the projects of the South Carolina State Ports Authority are authorized by State law S.C. Code §54-3-100. Other

agencies of the State issue revenue bonds in the same manner as does the South Carolina State Ports Authority. The South Carolina State Ports Authority revenue bonds are tax exempt.

o. In 1992, the State of South Carolina designated the South Carolina State Ports Authority as the agency to acquire the site for the new BMW plant in Spartanburg County and to perform other obligations of the State to BMW. Thirty-two Million and No/100 ($32,000,000.00) Dollars were transferred from the State Treasury to the account of the South Carolina State Ports Authority to pay the purchase price of the land. An additional Eight Million and No/100 ($8,000,000.00) Dollars was transferred to prepare the site for BMW's use. The South Carolina State Ports Authority also used Five Million and No/100 ($5,000,000.00) Dollars of its funds to provide additional funds to acquire the property for this plant site.

p. The South Carolina State Ports Authority is listed as an agency of the State in each annual Legislative Manual, and its operations are included in each annual Comprehensive Financial Statement of the State of South Carolina.

q. The South Carolina State Ports Authority has no stock, no stockholders, and no private interests in its operations.

r. The South Carolina State Ports Authority and its officials and employees are subject to the State Ethnics [sic - Ethics] Act. S.C. Code §§ 2-17-5 et seq. and 8-13-100 et seq.

s. The South Carolina State Ports Authority appoints and hires the Executive Director of the Authority, and he serves at the pleasure of the Board. The Board of the authority supervises the employment of all other employees of the Authority.

t. The staff of the South Carolina State Ports Authority works with the staff of the other State agencies on a daily basis.

u. The South Carolina State Ports Authority publishes its annual report in newspapers throughout the State (S.C. Code § 54-3-1040) and delivers it to the General Assembly. (S.C. Code § 54-3-860).

v. The South Carolina State Ports Authority has quasi-police type controls over the Port (See title 54 of S.C. Code) and must approve (S.C. Code § 5-3-610 et seq.) or certify all private piers in the port of Charleston and in other critical areas. (See §§ 48-39-110 and 48-39-150.)

w. Lost [sic - Loss] claims and legal actions against the South Carolina State Ports Authority are controlled by the South Carolina Tort Claims Act. S.C. Code § 15-78-10 et seq., and the South Carolina State Ports Authority is subject to the S.C. Freedom of Information Act S.C. Code 30-4-10 et seq.

x. The South Carolina State Ports Authority is an agency of the State of South Carolina, is in a real sense a part of the State and shares in its sovereignty, and is completely identified with the State and the performance of its functions which are unquestionably of a governmental character.

2. I have given this statement freely and voluntarily, and it is true and correct to the best of my knowledge and belief.

Dated this the 27th day of May, 1993.

/s/ William M. Lawrence
William M. Lawrence
Chief Financial Officer
South Carolina State
Ports Authority

SWORN AND SUBSCRIBED
before me this the 27th
day of May, 1993.

/s/ Janice E. Lockridge
Notary Public South Carolina
My Commission Expires: Sept. 24, 2001

(4)

Supreme Court, U.S.
FILED
NOV 1 1995
CLERK

No. 95-456

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

I. THE AUTHORITY HAS NOT DISPROVED THE EXISTENCE OF THE CONFLICT BETWEEN HESS AND THE FOURTH CIRCUIT'S DECISION AND HAS NOT PRESENTED ANY REASONS FOR DENYING CERTIORARI.

A. Introduction

In their Petition for Certiorari, the Ristows have shown the existence of a genuine conflict between the Fourth Circuit's analysis of the state treasury factor and the standards for evaluating Eleventh Amendment questions set forth in Hess v. Port Authority Trans-Hudson Corp., 513, U.S. _____, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994) which clearly meets the criteria for Supreme Court review under Rule 10.1. The Authority's Brief has done nothing to disprove the existence of this conflict, and its arguments fail to show why certiorari is not appropriate. The Ristows will now reply to those sections of the Authori-

ty's Brief which are believed to require discussion at this point.

B. Reply to Statement of the Case Discussion

On page 2 of its Brief, the Authority claims the Ristows description of the Ports Authority is scanty and argumentative. It then sets forth numerous statutory sections on pages 3 through 8 in an attempt to show the Authority's alleged lack of autonomy from the State.

Recognizing that this is a Petition and not a brief on the merits, the Ristows have adequately described the Authority on pages 4 and 5 of their Petition and have furnished the Court with applicable statutory provisions concerning the Authority in Section E of their Appendix. The Ristows have stated the Authority has "highly autonomous pow-

ers" and believe the applicable statutes cited support this proposition. (Petition, p. 4)

C. Reply to Authority's Dignity Arguments

1. General Dignity Discussion

The Authority contends on pages 10 and 11 of its Brief that it meets the two pronged test of state dignity and solvency for Eleventh Amendment immunity set forth in the majority's opinion in Hess. Actually, the Authority satisfies neither prong of the test. Even though the Fourth Circuit did not employ dignity considerations as a basis for its decision and only briefly mentioned dignity, the Authority attempts to find alternative grounds of support since the Fourth Circuit's decision on financial grounds so obviously conflicts with

Hess. (See Petition at p. 36-52)

The Court's dignity discussion in Hess offers no support for the Authority's position. On pages 255 through 257 of the Hess opinion, Justice Ginsburg discussed dignity as a relevant consideration in an Eleventh Amendment analysis citing a passage from Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, 506 U.S. ____, 113 S. Ct. 684, 121 L. Ed. 2d 605, 614 (1993).

Because Hess involved an interstate compact entity which occupies ". . . a significantly different position in our federal system than do the States themselves..."[1] and there is a rebuttable presumption against Eleventh Amendment

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[1] Hess, 130 L. Ed. 2d at 255.

immunity for interstate compact entities[2], the Court obviously felt compelled to justify the presumption by addressing the dignity issue and the special place occupied by bi-state entities. However, once it found the indicators of immunity under the bi-state presumption were inconclusive, the Supreme Court then emphasized the treasury factor. Hess, 130 L. Ed. 2d at 258-263. Since a presumption against immunity is not involved herein, the analysis is properly directed at the state treasury factor.

When looking at the dignity considerations, it is also extremely important to remember that in the Puerto Rico

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2 Hess, 130 L. Ed. 2d at 257.

Aqueduct case the Supreme Court granted certiorari to resolve the issue as to whether a district court order denying an Eleventh Amendment immunity claim may be immediately appealed under the collateral order doctrine. Puerto Rico Aqueduct, 121 L. Ed 2d at 610. The Court held that States and entities claiming to be arms of the State may take advantage of the collateral order doctrine to immediately appeal an order denying Eleventh Amendment immunity. Puerto Rico Aqueduct, 121 L. Ed. 2d at 615. Thus, the Court faced a separate procedural question concerning the Eleventh Amendment which was independent of the substantive issue concerning the Authority's actual entitlement to immunity. Such procedural concern is not present herein.

2. State Forum Considerations and Dignity

On pages 11 through 13 of its Brief, the Ports Authority contends the denial of Eleventh Amendment immunity would offend the dignity of South Carolina because the forum selection clause, S.C. Code Ann., Sec. 15-78-100(b), would be violated and the state forum bypassed. Essentially, the Ports Authority is proposing that the South Carolina General Assembly's forum choice should conclusively resolve the dignity issue in their favor. Such argument, however, overlooks the fact that questions of Eleventh Amendment immunity are ultimately governed by federal law. See Ram Ditta v. Maryland National Capital Park and Planning Commission, 822 F. 2d 456, 459-460 (4th Cir. 1987) and Blake v. Kline, 612 F. 2d 718, 722 (3rd Cir.

1979), cert. den. 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980). Eleventh Amendment questions simply cannot be decided on the basis of a state's own legislative choice. [3]

The Hess decision has also removed any doubt as to the existence of a state forum being a relevent factor in an Eleventh Amendment analysis. In Hess, the Court noted the existence of a state court forum, but attached no significance to the same. Hess, 130 L. Ed. 2d at 252.

3. Structural Considerations and Dignity

On pages 13 through 15 of its Brief, the Ports Authority recites the struct-

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[3] The Authority's argument also ignores the fact that the Ristows' alternative claim is for breach of contract. See Complaint at App. F18-22.

tural considerations cited in Hess to show why suit in federal court is not an affront to a bi-state entity thereby supporting a presumption against immunity. The Authority then discusses the differences between the two entities which it believes should convince the Court that the Ristows' action offends the State's dignity. Authority's Brief at p. 15-17. While the structural considerations regarding the creation of an interstate compact entity are not present in the case at bar, other structural considerations pertaining to the Authority provide compelling reasons as to why a federal court suit against the Authority would not offend South Carolina's dignity.

On page 16, the Authority claims the factors indicating immunity in Hess were

insufficient to overcome the presumption. The Ristows would again point out that Hess was not decided on the basis of the presumption due to the inconclusiveness of the indicators. Hess, 130 L. Ed. 2d at 258. Once it determined the indicators were inconclusive, the Court essentially disregarded the presumption and moved to general immunity grounds. Hess, 130 L. Ed. 2d at 258.

The most convincing structural consideration showing the Ristows' suit to be inoffensive to the State's dignity is the Authority's autonomy which is discussed at pages 61-63 of their Petition. Other structural features, revealed by statutes allowing it to deal with the U. S. Government and entities located in Georgia, demonstrate that the

Authority was designed to participate in the realm of foreign and interstate commerce.

Sec. 54-3-120 of the South Carolina Code Ann. gives the Authority jurisdiction over the waters and shores of the harbors and seaports within the State. (App. E6) Sec. 54-3-200 permits the Authority to operate railroads, and Sec. 54-3-210 allows the Authority to make agreements with railroad employees in accordance with the federal Railway Labor Act. (App. E25-27) Navigable waters and railroads, of course, fall within the domain of interstate commerce.

The following provisions illustrate the Ports Authority's extensive dealing with the federal government. Sec. 54-3-

130(4) indicates one of the Authority's purposes as being to cooperate with the federal government in developing and maintaining the seaports and harbors. (App. E8) Sec. 54-3-130(6) states that another purpose is to act as agent for the United States and its agencies. (App. E9) Sec. 54-3-190 empowers the Authority to transfer property to the United States as well as to assist the federal government with property acquisitions. (App. E22-25) The Authority may apply to the Foreign-Trade Zones Board to establish and maintain such trade zones under Sec. 54-3-230. (App. E27-29)

Pursuant to Sec. 54-3-130(7), the Ports Authority may cooperate and act as co-assurer with Augusta, Georgia and the Georgia State Ports Authority regarding

the Savannah River Project thereby giving the Authority a bi-state characteristic. (App. E9-10) Finally, Sec. 54-3-140(6) permits the Ports Authority to establish offices outside the State. (App. E13) The Authority was clearly designed to participate in the stream of interstate commerce and interact with the federal government. Thus, the dignity of the State of South Carolina would not be offended by allowing the Authority to be sued in federal courts.

D. Reply to Authority's Purse Arguments

On pages 17 through 19 of its Brief, the Authority argues that South Carolina's purse is vulnerable to a judgment in the Ristows' favor. Underlying the Authority's purse contentions is the now discredited broad financial/symbiotic

relationship rationale. Such reasoning simply ignores the practical and legal separation of the Authority's assets from those of the State as well as the Court's focus in Hess on the practical and legal bearing of indebtedness should expenditures exceed receipts. Hess, 130 L. Ed. 2d at 262. The test is clearly not whether the state has made any contributions to the entity or whether the state has access to its surplus. Since the Ristows have covered these matters on pages 29 through 49 of their Petition, they would refer the Court to such discussion.

E. Reply to Authority's Argument that the Fourth Circuit Decision Is Harmonious with Hess.

The Authority contends on pages 19 and 20 of its Brief that the Fourth Circuit's decision herein is harmonious

with Hess. The Ristows have extensively detailed why these decisions directly conflict and would direct the Court's attention to pages 36 through 52 of their Petition.

F. Reply to "Important Differences" Discussed by the Authority

On pages 20 through 24 of its Brief, the Authority sets forth numerous differences between itself and PATH which it believes are significant. In Section 4a, the Authority notes that it is a single state entity while PATH is a bi-state entity. This "important" difference is not relevant since the Court decided Hess not on grounds particular to bi-state entities but on the basis of general immunity considerations. Hess, 130 L. Ed. 2d at 259-263. (See Petition at p. 23-25)

In Section 4b, the Authority notes

that Hess involved a FELA claim whereas the Ristows' action is a state law claim. The Ristows believe the particular nature of the claim was not a significant factor in Hess, and thus this distinction is immaterial.

The Ports Authority in Section 4c states that Hess created a different test for bi-state entities, i.e. a presumption against immunity unless there is a good reason to believe the States structured it to enjoy immunity and Congress concurred. Such presumption and its test are not applicable to the Authority, and the Ristows have never claimed otherwise. The Court's ultimate decision in Hess on general immunity grounds and the inapplicability of the presumption to this case render the Authority's comments in Section 4c ir-

relevant.

In Section 4d, the Ports Authority again recites a list of financial differences between it and the Port Authority Trans-Hudson which are immaterial in light of the actual financial analysis approach set forth in Hess. (See Petition at p. 29-36)

The Authority's statements about the issuance of bonds and the like is an obvious attempt to distract the Court from the absence of any continuing funding obligation on the part of the State as well as Hess's pronouncement about the proper focus of the financial analysis being on the entity's losses and debts and state responsibility for the same. The State has not made an annual appropriation for the operation of the Authority since 1959. (App. A. 13)

With respect to the Authority's comments regarding control in Section 4e, the Ristows would refer the Court to their discussion of this matter on pages 59 through 63 of their Petition. Finally, in Section 4f, the Authority discusses waiver. Throughout this litigation, however, the Ristows have argued that the Ports Authority is not entitled to immunity; they have not claimed any waiver of the same. Furthermore, Hess was not decided on the basis of waiver. Thus, any discussion of waiver is irrelevant.

G. Reply to Authority's Solvency Factor Arguments

The Authority's expansive view of the state treasury presented on pages 24 through 26 ignores the test in Hess which is focused on the practical and

legal bearing of an entity's indebtedness should expenditures exceed receipts and not on a state's voluntary contributions and access to surplus. Such argument is also inconsistent with the practical and legal separation of the Authority's assets from those of the State.

Conclusion

In their petition, the Ristows have demonstrated the existence of important considerations which necessitate the granting of certiorari in this case. They have also shown that the Ports Authority is not entitled to Eleventh Amendment immunity since the state treasury is not practically obligated to bear a judgment in their favor. For the reasons recited in their petition and this brief, the Ristows' petition for

certiorari should be granted and it is respectfully requested that the Court grant the same.

Respectfully submitted

Leonard W. Schulz
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Attorney of Counsel
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Attorneys for Petitioners,
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Dated: October 31, 1995